



# FROM TO REGISTRATION RECOUNTS REVISITED:

Developments in the Election  
Ecosystems of Five Midwestern States



By Steven F. Huefner, Nathan A. Cemenska,  
Daniel P. Tokaji, & Edward B. Foley

# **From Registration to Recounts Revisited:**

## **Developments in the Election Ecosystems of Five Midwestern States**

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A Project of *ELECTION LAW @ MORITZ* at  
THE OHIO STATE UNIVERSITY  
MORITZ COLLEGE OF LAW

**By Steven F. Huefner, Nathan A. Cemenska,  
Daniel P. Tokaji, & Edward B. Foley**

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# CONTENTS

	PAGE
List of Tables	ii
Acknowledgements	iii
About FROM REGISTRATION TO RECOUNTS and <i>Election Law @ Moritz</i>	v
Executive Summary	vii
Introduction	1
Chapter One: Minnesota	5
Chapter Two: Ohio	19
Chapter Three: Wisconsin	37
Chapter Four: Illinois	51
Chapter Five: Michigan	61
Chapter Six: Recommendations and Conclusions	71
Appendix: Individuals Consulted	87
About the Authors	91

# LIST OF TABLES

	PAGE
<b>Table One: Important Statutory Changes to Minnesota Election Law</b>	11
<b>Table Two: Timeline of Coleman – Franken 2008 Election Contest</b>	15 -16
<b>Table Three: Proportion of Absentee Voters in Urban Ohio Counties</b>	25
<b>Table Four: Absentee and Provisional Ballot Rejection Rates in Urban Ohio Counties</b>	26
<b>Table Five: Narrowest Victory Margins in U.S. Elections, 2000-2010</b>	41
<b>Table Six: Absentee Ballots as a Percentage of Ballots Cast Across the Five States</b>	47
<b>Table Seven: Convenience Voting Across the Five States in 2010</b>	58
<b>Table Eight: Post-Election Timelines Across the Five States</b>	78
<b>Table Nine: Consequences of HAVA Mismatches Across the Five States</b>	80

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And finally, as with the original study, we are continually grateful to our families for their encouragement and support, and also for providing us such obvious and important incentives to work to promote and strengthen our democratic processes.



## About **FROM REGISTRATION TO RECOUNTS**

In the summer of 2006, the authors set out to study how five key Midwestern states had responded to the Help America Vote Act of 2002 and to the increased attention that matters of election administration had received in the wake of the 2000 presidential election. All of the five studied states – Illinois, Michigan, Minnesota, Ohio, and Wisconsin – had historically played pivotal roles in national politics, and in the early 21<sup>st</sup> century remained broadly representative of the U.S. as a whole. Furthermore, each state had a gubernatorial election looming in the fall of 2006, providing a rich opportunity to test the functioning of their recently revamped election ecosystems. The result of that study was **FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES**, published in 2007 to wide acclaim for its comprehensive analysis and objectivity.

As that original study made clear, however, election reform remained an uncompleted task more than one full presidential election cycle after *Bush v. Gore*. The 2007 book therefore included a number of state-by-state recommendations for further improvements, as well as overall judgments about the prerequisites of a sound election administration ecosystem. Thus, it was natural for the authors to return to the field during and after the 2008 presidential election to observe how election administration had continued to evolve in these five bellwether states in the two years since the original study. This sequel, **FROM REGISTRATION TO RECOUNTS REVISITED: DEVELOPMENTS IN THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES**, presents the results of that return to the field.

## About ***Election Law @ Moritz***

*Election Law @ Moritz* is an award-winning program of nonpartisan research, education, and outreach concerning election law and administration. Formed in 2004, *EL@M* is a collaboration among the many faculty and staff of The Ohio State University Moritz College of Law with expertise in election law and related fields. Today *EL@M* is one of the country's premier centers of election law expertise, serving as a resource for lawyers, academics and educators, journalists, policymakers and other civic leaders, election administrators, and citizens interested in election law issues. Whether through its website at [www.electionlaw.osu.edu](http://www.electionlaw.osu.edu), faculty scholarship, conferences and programs, or media assistance, it is a resource for accurate and nonpartisan information and analysis. The principal faculty of *EL@M*, including its Director and Senior Fellows, are experts in the Help America Vote Act of 2002 and its implementation, including issues of voter identification and provisional voting; voting equipment design and technology; voting rights; and post-election recount and contest procedures. All of this expertise is brought to bear in the **FROM REGISTRATION TO RECOUNTS** project.





## EXECUTIVE SUMMARY

THIS REPORT IS A COMPANION to our 2007 book, *FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES*.<sup>1</sup> That book reported the results of our 18-month study of the 2006 election, in which we compared the legal frameworks and administrative structures that shaped the voting processes in Ohio, Illinois, Michigan, Wisconsin, and Minnesota. These five states were ripe for study then not only because they have repeatedly played a pivotal role in national politics, but also because each of these states has been involved in a variety of election administration reform efforts over the past decade, and because they are broadly representative of the country as whole. Thus, the lessons they offered had application well beyond these five states.

Now, even more can be learned. When *FROM REGISTRATION TO RECOUNTS* appeared in print in late 2007, the 2008 election cycle was already underway. The 2008 election provided an opportunity to monitor how the five states continued to adjust their election processes, to see how they responded to the thorniest problems that arose in 2006, and to revisit several of the key observations of the earlier study. The result is this follow-up to the original book. Although our original study analyzed nine aspects of election administration, this follow-up study focuses on four: (1) continuing adjustments to the institutional arrangements; (2) voter registration databases, (3) convenience voting, and (4) post-election processes. Our conclusions concerning these four areas are summarized below, along with (5) an identification of several other potential topics that seem largely to have faded into the background, and (6) the major election reforms

that the five studied states have adopted since 2006.

### 1. INSTITUTIONAL ARRANGEMENTS

Our original study analyzed the influence of different “hard” institutional choices, such as whether to administer elections using an elected Secretary of State or, instead, a state elections board. (Like the distinction between hardware and software, “hard” institutions refer to actual administrative structures embodied in law, whereas “soft” institutions refer to customs, traditions, and other social forms of behavior that help to determine how the hard institutions operate.) The study also noted that each of the five states was affected by “soft” institutions in the form of cultural norms and traditional administrative practices. These soft institutions are sufficiently important to make or break an elections system, even one that is perfect on paper. In other words, good law still depends on good citizens who follow it conscientiously.

***Hard institutions.*** Some changes have occurred in hard institutions since our original book was published in December of 2007. Several states have seen efforts to establish or tinker with the use of appointed boards to supervise elections at the state level, rather than assigning this task to an elected Secretary of State. The most important change along these lines occurred in Wisconsin, where the responsibilities of the State Elections Board, the chief elections authority in the state, were transferred to a new entity called the Governmental Accountability Board (“GAB”). Although this change was prompted mostly over concerns regarding campaign ethics abuses, rather than election administration, the change

is still important to election administration. While the old board consisted of eight members each appointed by various designated leaders in state government, the new board consists of six retired state court judges appointed by the governor and confirmed by two thirds of the state legislature.

As discussed in the Wisconsin chapter of this book, we think the new system is a substantial improvement upon something that was already a good model. Local administrators report satisfaction with the new board and say that they have great respect for its non-partisanship and expertise. The board is entirely composed of retired members of Wisconsin's judiciary, a judiciary that, despite some recent concerns on this point, at least historically has held a high reputation for integrity and nonpartisanship. The board has also been praised for its outreach efforts by touring the state to discuss the concerns of everyday citizens. The board is using the credibility it enjoys to propose important changes to improve the state's information technology infrastructure and overhaul other administrative areas over the next five years. (As this book goes to press, Wisconsin's board has become caught up in the heat of the political moment in that state concerning the potential recall of elected representatives because of their stances on public sector unions. We suspect that, once the dust settles over this particular dispute, the nonpartisan institutional arrangement of the board will have held up well under intense pressure and scrutiny, and will have fared much better than any partisan institution charged with the same responsibilities. Still, we leave a comprehensive scholarly analysis of this episode to future research.)

We applaud these improvements in Wisconsin and hope that other states will seriously

consider similar models, as an independent board is the “gold standard” of election administration at the state level. While elected Secretaries of State are often conscientious public servants who do great good, they are ultimately politicians who should not be subjected to the inherent conflict of interest that comes with supervising the conduct of partisan elections. That conflict of interest is eliminated, or at the very least substantially mitigated, by turning to an independent board of appointed individuals. And although the individual board members themselves may not have time to involve themselves in the day-to-day administration of elections, by having a full-time executive director and staff like Wisconsin, the board as an *institution* can be just as involved and “hands-on” with regard to elections as any Secretary of State.

Nevertheless, it is important to note that one test of institutional soundness is how well a state can handle a significant post-election dispute. While it recently completed an important statewide recount for state Supreme Court, Wisconsin, like Michigan and Illinois, has not been through the crucible of protracted post-election litigation like that seen in Minnesota and Ohio. Until then, evaluating the elections systems of these states requires some amount of conjecture.

***Soft institutions.*** In our previous book, we noted that different geographic regions have different expectations and attitudes about elections. Some states, including Minnesota and Wisconsin, have a reputation as “good government” states with a healthy, cooperative political climate. Meanwhile, in Illinois, Michigan, and Ohio, election administration may sometimes be fought over as more of a political spoil, rather than as a neutral administrative question.

Since the prior study, litigation in both Minnesota and Ohio has given us additional insight into these two states that we do not have for the other three. In the *Coleman v. Franken* proceedings, Minnesota's system functioned with a great deal of attention to concerns about transparency and guarantees against partisan bias. Secretary of State Ritchie, the State Canvassing Board, local election officials, recount volunteers, the three-judge panel, the media, and the Minnesota Supreme Court worked together as a team to resolve the dispute in a professional way that was relatively insulated from partisan bias.

In contrast, in Ohio the political parties have come to think of the elections system as something they need to try to control, and to suspect their opponents of having competing aspirations. Neither Secretary of State Jennifer Brunner, a Democrat, nor her predecessor, Kenneth Blackwell, a Republican, was as successful as Minnesota at avoiding unnecessary elections disputes and allegations of partisanship. Ohio also has a mixed image with respect to local election administration, largely as a result of administrative problems that happened in 2004 and 2006 in Franklin and Cuyahoga Counties. Because of these and other factors, in Ohio any election contest of the magnitude of *Coleman v. Franken* likely would generate a great many accusations of partisanship, founded or not. The public also would be more likely to view the outcome as unfair.

## **2. "MATCHING," AUTOMATIC VOTER REGISTRATION, AND OTHER DATABASE ISSUES**

A major election administration story of the 2006-2008 period is the evolution of the database matching procedure required

by federal law to verify the information on incoming voter registration applications against information contained in government databases. Two of the five states in our study, Ohio and Wisconsin, were sued over this issue, although from slightly different angles. In Ohio, a Republican suit contended that the Secretary of State was violating federal law by not having a system in place that allowed local officials to verify the proper information.<sup>2</sup> A federal district court initially ordered that the Secretary put such a system in place,<sup>3</sup> and an *en banc* panel of the Sixth Circuit, in a 10-9 vote that provides an interesting look into how to think about the database question, affirmed this order.<sup>4</sup> However, in the end the U.S. Supreme Court vacated the order on procedural grounds. The Wisconsin dispute was similar, and also failed on purely procedural grounds.<sup>5</sup> Because neither of these suits was decided on the merits, significant questions remain as to what exactly the Help America Vote Act ("HAVA") of 2002 requires in terms of database matching, and we expect further litigation in this area.

On a related registration topic, the five Midwestern states in this study are now beginning to see a significant push towards new registration procedures that will automatically register to vote any citizen with a driver's license or state ID, unless that voter opts out of the program. While there is essentially no chance that automatic voter registration ("AVR") will be in place before the federal 2012 election, Ohio legislators introduced a bill that included AVR,<sup>6</sup> Wisconsin legislators introduced a bill to install AVR in time for 2015,<sup>7</sup> and Minnesota passed an AVR bill that the governor vetoed.<sup>8</sup> While none of these bills became law and some of them fared better in the legislature than others, we expect an ongoing push in this area.

### 3. THE ASCENSION OF CONVENIENCE VOTING

The 2008 Presidential election saw the continuation of a significant trend towards mail-in voting and in-person early voting. The trend was most dramatic in Ohio and Illinois, which saw large growth in mail-in and in-person early voting programs, respectively. In Ohio, the percentage of voters voting absentee increased from 10.6% in 2004 to 30.4% in 2008,<sup>9</sup> although 6.8% of that percentage represents absentee ballots cast in-person as a form of “early voting.”<sup>10</sup> It therefore represents tremendous growth of a process in which the voter does not have to come into personal contact with election officials or poll workers at any point in the voting and registration process. Michigan also saw large increases in absentee voting, which rose from 17.7% in 2004 to a 2008 figure of 24.9% of all ballots cast,<sup>11</sup> mostly by mail.

In Illinois, the situation is very different. Traditional mail-in absentee voting has not caught on there, largely because the state in 2008 was still requiring voters to provide an “excuse” in order to cast a mail-in ballot. Although the Illinois legislature has since changed the law to permit absentee voting without an excuse, in 2008 the focus was on an in-person early voting model that came to Illinois in 2005 and was first used in a federal election in November of 2006, where approximately 8% percent of voters chose this method of voting. The November, 2008, election, however, was where early voting showed its true potential: approximately 25% of all voters in the state used early voting. No other state in our study has near that level of in-person early voting.

### 4. POST-ELECTION PROCESSES

Minnesota’s election contest over its 2008 race for U.S. Senate was a high profile case study of the state’s post-election processes, including the initial election-night count, preliminary corrections, the counting of absentee and provisional ballots, certification of the initial result, and any potential recounts, election contests, or other lawsuits. Careful reflection on this contest can teach a number of lessons not only for Minnesota, but also broadly applicable to other states. For instance, this experience showed the overarching importance of structuring the entities that decide post-election disputes to be fair and free from partisanship. The contest also showed how some long-accepted practices need to change to reflect new voting patterns, particularly rising levels of absentee voting. It showed how officials need to establish ground rules ahead of time to distinguish between voting errors committed by voters and errors that are the fault of poll workers or election officials and that therefore should not be used to invalidate ballots. Likewise, all states need to establish ground rules for what to do with the “commingled ballots problem,” the situation where some ballots that should not have been eligible to be counted have made it into the count and cannot be individually identified for removal.

Because the Minnesota example is so instructive, we feature Minnesota as the first state chapter in this book. We begin each of the other state chapters of this book with an in-depth hypothetical scenario in which the facts of Minnesota 2008 are transplanted to the four other states in this study. Using this technique, we attempt to predict the challenges courts and administrators might experience in this kind of contest, where the closeness of the original

tally causes every procedure to be examined under a microscope. Based on our analysis, we believe that all four of the non-Minnesota states should update at least some of their laws to better handle future election contests, and that Illinois in particular is in need of a major overhaul. Recommendations for reform are discussed in each of the individual state chapters, with additional commentary in the conclusion of this book.

## 5. THE DOGS THAT DIDN'T BARK

The 2007-2008 election season saw a few new administrative issues rise to the fore, but it also saw some traditional ones fade into the background. One area that had received a lot of attention in the past, but received relatively little attention in 2008, was voting technology. One exception to this was in Ohio, where Secretary of State Jennifer Brunner commissioned a “top to bottom” review of the state’s voting technology and based on that study forced Cuyahoga County, home of Cleveland, to abandon its DRE machines for optical scanners. While the move did trigger one lawsuit,<sup>12</sup> overall, voting machines and voting machine security were quiet areas, and all five states in our five-state study seem to accept their current technology, at least for the time being.

Provisional voting was also a relatively quiet area, except, again, in Ohio. The outbreak of provisional voting litigation prior to 2006 mostly concerned whether provisional ballots cast in an incorrect precinct were eligible to be counted. Minnesota does not have provisional voting, and Wisconsin sees only a few hundred provisional ballots cast every year, while Michigan lets voters avoid having to cast a provisional ballot if they sign an affirmation of registration and eligibility.

In Illinois, the candidacy of Barack Obama produced overwhelming Democratic margins and seemed to have caused the political parties to concentrate their resources on areas other than elections litigation.

In Ohio, however, provisional ballots have continued to be an issue. The 2008 election resulted in *State ex rel. Skaggs v. Brunner*,<sup>13</sup> a post-election action to determine whether provisional ballots with technically incomplete or incorrect paperwork should be counted. Two other cases came out of the 2010 election. In *Painter v. Brunner*,<sup>14</sup> the Ohio Supreme Court determined that provisional ballots cast in the wrong precinct cannot be counted even though poll worker error was what caused them to be cast in the wrong precinct. In *Hunter v. Hamilton County Board of Elections*,<sup>15</sup> a related case, the Sixth Circuit determined there was a likelihood of success on the plaintiff’s claim that a county board of elections violated *Bush v. Gore*-style equal protection rights when it considered extrinsic evidence of poll worker error in determining whether to count certain provisional ballots, but did not consider the same level of evidence when determining whether to count other provisional ballots that were cast under similar though slightly different circumstances. We expect Ohio courts to continue struggling with the issue of provisional ballots so long as rules for counting them remain intricate and they continue to be cast in relatively great numbers.

Finally, like provisional balloting, voter ID was largely not an issue in the five states of our study. Litigation in Ohio and Michigan<sup>16</sup> had already clarified most of the voter ID rules, and a U.S. Supreme Court case from Indiana seems to have discouraged further efforts to mount constitutional challenges to such laws. Wisconsin, Illinois, and Minnesota do not

currently require identification of most voters beyond a matching signature, eliminating this as an issue for the time being. However, Wisconsin just passed a law that will require identification of all voters at the polls in 2012, the effects of which remain to be seen, and Ohio has seen some discussion of adopting a stricter ID requirement.

## **6. STATUTORY CHANGES SINCE 2007**

Legislative deadlock has blocked efforts to make more substantial amendments to election statutes in Michigan and Ohio through 2010, but Minnesota, Illinois, and Wisconsin have seen significant changes. One important change occurred in Wisconsin, where in May of 2011 the governor signed a law that will require voters to present ID when casting their ballots. The new law applies not only to in-person voters, but also to voters casting their ballots by mail, who must enclose a copy of their ID with their ballots—a stricter procedure than that used in most states. The ID requirement will be fully implemented by the 2012 election, and voters will have to present a valid driver's license, passport, tribal ID, or naturalization papers in order to vote. Voters who do not present the required ID will have to cast provisional ballots. Depending on how many people fail to present the required ID, the new system could transform Wisconsin from a state with virtually no provisional balloting (and no conflicts over provisional balloting) to a state with a moderate reliance on provisional ballots and all their accompanying potential for post-election complications.

Legislative changes in Minnesota and Illinois have been more limited, but still important. The Minnesota legislature, having learned many lessons from the 2008 Senate contest (and also under pressure from the 2009 congressional

enactment of the Military and Overseas Voter Empowerment Act (“MOVE”), passed three bills that together move the federal primary from September to August, extend the absentee voting period from 30 to 46 days before the election, flesh out procedures for cleaning the voter registration database of bad registrations, require provision of a Social Security or other identification number to request an absentee ballot, require absentee ballots to be counted centrally by bipartisan canvassing boards, and require that detailed records of ballots be kept both in the polling place and in the absentee balloting process. These changes address many of the small flaws and potential areas for concern revealed by the 2008 election.

In Illinois, the most important change has been the state's adoption of no excuse absentee voting, which will supplement Illinois already-popular in-person early voting program and bring greater convenience to voters. As discussed in the Illinois chapter, the trend towards absentee voting has had significant administrative consequences in states like Ohio, and Illinois will have to adjust some of its procedures to fit with its new model. The other major change in Illinois is extending the state's “grace period” registration window, which now allows voters to register and cast a ballot in a one-stop transaction as late as seven days before each election. While this is a newer program, and participation remains low, it is growing, and in the future it will be interesting to see the consequences of expanded participation.

No large-scale changes have occurred in Ohio or Michigan, although significant reforms are being discussed in both states as this book goes to press. In Michigan, the newly elected Secretary of State has proposed authorizing “no excuse” absentee voting for those who present photo ID, creating one uniform ballot for in-



person and absentee voting, and creating a new “Election Crimes Unit” to investigate fraud. In Ohio, legislative deadlock caused by the two houses of Ohio’s legislature being controlled by different political parties between 2008 and 2010 prevented Ohio from adopting reforms in the wake of issues (such as problems with provisional voting) that emerged in the 2008 election. Because one party, the Republicans, controlled both houses of the Ohio legislature after the 2010 elections, it is anticipated that the legislature will soon enact a bill that is currently making its way through each house in slightly different versions. This one-sided legislative effort, similar to what has occurred in other states where Republicans gained legislative control after November 2010, has been attacked by Democrats and voting rights groups as unnecessarily restricting access to the franchise. (Indeed, one of the co-authors of this book, Dan Tokaji, testified against the pending legislation on this ground.) It remains to be seen whether this new legislation has the adverse effect on voter turnout that some have predicted; surely, an examination of this issue will be on the scholarly agenda after the 2012 election.



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<sup>2</sup> *Ohio Republican Party v. Brunner*, No. 2:08-cv-00913 (S.D. Ohio Sept. 26, 2008), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/ohiorepublicanpartyv.brunner.php>.

<sup>3</sup> Temporary Restraining Order, *id.*, *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ORP-TRO-10-10-08.pdf>.

<sup>4</sup> *Ohio Republican Party v. Brunner*, 544 F.3d 711 (6th Cir. 2008), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/orpvbrunnerenbanc.pdf>.

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<sup>8</sup> *Automatic Voter Registration Vetoed*, ST. PAUL PIONEER PRESS (Minn.), May 23, 2009, at B2.

<sup>9</sup> See United States Election Assistance Commission, 2008 *Election Administration and Voting Survey* 23-25, Tables 29A and 29B, *available at* <http://www.eac.gov/assets/1/Documents/2008%20Election%20Administration%20and%20Voting%20Survey%20EAVS%20Report.pdf>.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> *ACLU v. Brunner*, No. 1:08-cv-00145 (N.D. Ohio Jan. 17, 2008), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/ACLUofOhiov.Brunner.php>.

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<sup>15</sup> *Hunter v. Hamilton County Board of Elections*, No. 10-4481 (6th Cir. Nov. 21, 2010), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/Hunter.php>.

<sup>16</sup> *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, No. 130589 (Mich. Apr. 26, 2006), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/michiganid.php>.

# INTRODUCTION

THIS BOOK IS A FOLLOW-UP to our earlier work, *FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES*.<sup>1</sup> That book, published in 2007, was the result of an 18-month study of the 2006 election, comparing the legal frameworks and administrative structures that shaped the voting processes in Ohio, Illinois, Michigan, Wisconsin, and Minnesota. As the Introduction to the 2007 book observed, these five states not only have repeatedly played a pivotal role in national politics, but today they also remain broadly representative of the country as whole. Moreover, between 2000 and 2006 each of these states had taken substantial steps to reform their system of election administration. In short, they were ripe for study, and the lessons they offered had application well beyond these five states.

Today, the lessons that can be learned by studying these five states are greater than ever. Minnesota experienced the first statewide federal election contest since 2000, and the first since enactment of the Help America Vote Act (“HAVA”) in 2002. Significant elections litigation has also occurred in Ohio and Wisconsin, and these conflicts have given greater definition to processes, like recounts, and concepts, like provisional balloting, that before were more vaguely understood. The growth has occurred not only because of new court precedents, but as all the stakeholders in the elections system gained greater experience administering elections in a post-HAVA world. There have also been continuing legislative debates over election rules such as early voting and voter identification. Nevertheless, the growth process is not complete, and as part of our study we were able to identify many areas of continuing

ambiguity that will be likely battlegrounds in future conflicts.

The original book limited itself to discussion of election administration, which was divided into nine key areas: institutional arrangements, voter registration and databases, challenges to voter eligibility, provisional voting, early and absentee voting, voting technology, polling place operations, ballot security, and post-election processes. Thus, the scope of the prior book did not include campaign finance issues, ballot access, redistricting, and other important aspects of any elections system. This new book continues to use that framework, but because it is an update it will focus only on the four areas that have generated the most material for discussion since the prior book: institutional arrangements; voter registration and databases; what we are now calling “convenience voting,” and formerly called “early and absentee voting”; and post-election processes. Readers who want to know more about the other five areas in our original framework should consult the first book for a detailed treatment of these topics.

Another framework retained from our previous book is the three core values we believe every elections system should promote: access, integrity, and finality. By access, we mean that registration and voting should be easy for everyone and free from unnecessary burdens. Thus, the current trend of more and more states making no-excuse mail-in absentee and in-person early voting available has increased access. By integrity, we mean not only that the result reached is trustworthy, accurate, and free of fraud, but also that it is recognized as such by the citizens who participated in the election. Because transparency is instrumental

in bringing about that recognition, it can be considered a part of integrity. Our third value of finality means that elections ideally should conclude with orderly counting and canvassing procedures—and should not require protracted litigation to determine the winner. Where post-election litigation is necessary, it should proceed with dispatch and reach a conclusive result at the earliest reasonable time so that the business of the government can go forward.

As might be imagined, these values, while each essential to a well-functioning election system, sometimes conflict. For instance, voter registration protects the integrity of elections by preventing double-voting, but if registration procedures include unnecessary steps, then they may harm the core value of access. Because of tensions like these, we follow the approach of our previous book: we view the elections systems of all five states as ecosystems in which it is dangerous to tinker with one element without considering how it might affect the others. Even where care is taken, unintended consequences of changes to the system might take years or even decades to become apparent. For these reasons, recommendations for reform should never be made in haste, or without the benefit of substantial study. This book treats each of the five states separately, before offering a set of overarching conclusions.

As was true of the original book, this follow-up study also was funded by a grant from the Joyce Foundation (<http://www.joycefdn.org/>). It builds upon years of scholarship from its authors that includes not only the prior book, but several law review articles and symposium papers,<sup>2</sup> a comprehensive 50-question FAQ for each of our states produced in 2006,<sup>3</sup> an online interactive database of clickable maps that compare election laws across the nation,<sup>4</sup> and attendance at dozens of symposia and conferences. As with

our prior book, it also builds upon *Election Law @ Moritz*'s real-time reporting on the legal issues surrounding each federal election, as well as significant post-election analysis of those events in the form of policy pieces on the *EL@M* website.<sup>5</sup>

But most importantly, this book reflects the wisdom and experience of the many election administrators, lawyers, community leaders and other stakeholders we interviewed for the original book—many of whom we re-interviewed for this update—as well as many new sources we were not able to interview before. By speaking with stakeholders from many different organizations and levels of government, we have tried to understand the complexity of how each level of the elections system fits together with all the others. The sources of these invaluable interviews may be found in the Appendix of this book.

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## CHAPTER ONE: MINNESOTA

THE DRAMATIC STORY of the 2008 election contest between Al Franken and Norm Coleman for a U.S. Senate seat reinforces the conclusion of our previous study that Minnesota's election system is strong and healthy. Over nearly eight months of proceedings, Minnesota's election officials, courts, and others deftly steered the case through the counting, recounting, and judicial contest phases. At the conclusion of the proceedings, when the Minnesota Supreme Court affirmed the trial court's rejection of Coleman's contest suit, Coleman graciously conceded the election and closed another chapter in Minnesota's history of well-run elections.

Yet the 2008 Minnesota U.S. Senate race also stands as a good example of how even the best-run elections can be incredibly complex, difficult to manage, and imperfect. Ballot security and accounting procedures were not always followed. In some cases ballots were lost or temporarily misplaced,<sup>1</sup> and there were credible allegations that some ballots had been double-counted<sup>2</sup> or wrongly accepted. Approximately 11% of all absentee ballots rejected in the initial statewide count were later shown to have been wrongly rejected, and the recount was marked by significant litigation and confusion over the extent to which previously rejected absentee ballots could be considered during the recount. Still, to focus on these details to the exclusion of all the things that went *right* in 2008 would paint an unfair picture.

True to its reputation for good government and civic cooperation, since 2008 Minnesota has learned from its experience and passed important statutory reforms of the recount and

absentee ballot processes. It also has amended relevant portions of its administrative code. The changes do not constitute a major overhaul of the system, but are targeted at providing greater definition to the recount process and better record-keeping and security procedures for the handling of ballots in future elections.

This chapter digests the 2008 Minnesota Senate race. It includes a critical evaluation of the state's performance, an update on the subsequent election reforms, and some suggestions for further improvement. For even more details, see co-author Edward Foley's definitive article,<sup>3</sup> as well as MINNESOTA POST journalist Jay Weiner's book, *This Is Not Florida*.<sup>4</sup>

### THE 2008 MINNESOTA SENATE ELECTION

On the night of November 4, 2008, while most of the nation was watching Barack Obama win his race to be the next President of the United States, Minnesotans could tell that the U.S. Senate race between Norm Coleman and Al Franken was not yet over. The unofficial election-night count showed Coleman, the incumbent, leading by 725 votes out of 2.9 million votes cast, a tiny margin that would require an automatic recount under state law.<sup>5</sup>

Of course, the election-night margin began changing as soon as administrators began reviewing their results, with both candidates pushing for adjustments in their favor. Two days into the count, Coleman's lead had diminished to 236 votes, mostly because of the correction of errors discovered in three small northern cities.<sup>6</sup> The Coleman campaign responded by calling these changes in Franken's favor "statistically

dubious,” prompting the Secretary of State to publicly defend the honesty and accuracy of the results.<sup>7</sup> Perhaps hoping to find some evidence of misconduct, Coleman then filed a public records request with all administrators across the state for all documents regarding the initial count and subsequent revisions, as well as for records concerning chain of custody and security procedures.

For his part, Franken also used public records requests to identify absentee voters whose ballots had been rejected because of defective signatures, and argued to the Hennepin County (Minneapolis) Canvassing Board that 461 of them should be included in the official count. The board rejected the request as premature,<sup>8</sup> and the Coleman campaign responded by accusing Franken of trying to “stuff” the ballot box. But Franken then brought a suit to force administrators to reveal the identities of all voters whose absentee ballots had been rejected,<sup>9</sup> and began contacting voters to investigate whether their ballots should be counted. Before that effort was complete, the State Canvassing Board (composed of the Secretary of State and four appointees) announced the official result of the election: Coleman led by just 215 votes.<sup>10</sup> The race would go to a hand recount.

The recount occurred in a whirl of litigation. Sometimes it was collegial, as when the campaigns came together to agree on a series of chain-of-custody procedures to be used in the recount. More often it was contentious, as when the candidates filed two lawsuits<sup>11</sup> concerning the treatment of absentee ballots and one concerning whether certain votes that may have been double-counted should be somehow removed from the count.<sup>12</sup> The campaigns also lodged thousands of challenges to in-person ballots to attempt to influence

their disposition, but later withdrew most of these challenges.

While the manual recount continued, Franken filed suit to force officials to include previously rejected absentee ballots in the scope of the recount,<sup>13</sup> which Coleman vigorously opposed. The State Canvassing Board had decided at the outset of the recount not to reexamine decisions about whether to count absentee ballots, but only to reexamine votes recorded on ballots that had been included in the original count. While the Minnesota Supreme Court, in a divided opinion, generally agreed with the Canvassing Board’s initial rule, it created an exception for any ballots that both candidates agreed were entitled to be counted. Accordingly, the State Canvassing Board ordered local officials to forward any previously rejected absentee ballots that might have been wrongly rejected, and received a total of 1,346 such ballots in response. Coleman and Franken agreed that 933 of the 1,346 forwarded ballots should be counted, a decision that Coleman would later try to rescind.

In the end, the manual recount of ballots—excluding the previously rejected absentee ballots discussed above—put Franken ahead by a mere 49 votes. Furthermore, the 933 previously rejected absentee ballots broke in Franken’s favor, extending his lead to 225 votes.

Coleman promptly filed his election contest, and, as required under Minnesota law, a justice of the Minnesota Supreme Court then appointed a three-judge panel based in Ramsey County to hear it. Because many issues had been resolved through the recount, the three-judge panel dealt almost exclusively with absentee ballot issues. Particularly, it had to define the standard for whether to count a very specific subset of the absentee ballots



that had been rejected in the election-night count. This subset consisted of the 1,343 ballots that administrators had forwarded to the Secretary of State as potentially eligible for counting, minus the 933 that the parties had already stipulated to count, for a total of 410 ballots. The standard the court reached would also apply to an additional 4,000 or so absentee ballots across the state that Coleman alleged were eligible for counting, but had not been identified and forwarded as such by counties to the Secretary of State.

On February 13, 2009, the trial court issued a memorandum clarifying Minnesota's standard for determining whether absentee ballots should be counted. Construing the statutory language primarily at issue (subsequently repealed),<sup>14</sup> the three-judge panel created nineteen hypothetical absentee ballot scenarios that mirrored real ballots where the accompanying paperwork had been mostly filled in correctly, but not completely. The panel then ruled that ten of the nineteen categories were ineligible to be counted and should be set aside.

This "Friday the 13<sup>th</sup> order," as Coleman lawyer Ben Ginsberg referred to it,<sup>15</sup> caused Coleman to protest that the three-judge panel was changing a "substantial compliance" standard for deciding whether to count absentee ballots to a "strict compliance" standard, and that at least some absentee ballots in these categories had already been accepted by election officials, the parties, and the courts under the more lenient standard. Coleman complained primarily about some of the 933 absentee ballots he had previously consented to count before the panel had clarified the counting standard, but he also expressed concern about some unspecified portion of the approximately 280,000 absentee ballots that had been cast statewide.

But it was too late. Coleman had previously stipulated that the 933 ballots should be counted, and at this stage in the proceedings the court was not going to revisit what ballots were counted on election night just because some unknown number of invalid absentee ballots might have accidentally made it into the count. Coleman cited precedent from other states and argued that the court had the power to randomly remove ballots from precincts when ineligible ballots had made it into the count, but there was meager precedent in Minnesota for this procedure,<sup>16</sup> and the court rejected it.

In the end, the election contest court counted 351 of the remaining 1,343 previously rejected absentee ballots, changing Franken's margin of victory to 312 votes.

Coleman appealed to the Minnesota Supreme Court, raising two primary issues: (1) whether in issuing the February 13<sup>th</sup> order the three-judge panel had changed the standards for determining whether to count absentee ballots, and (2) whether, prior to that time, election administrators around the state had used uniform standards for distinguishing between absentee ballots that were eligible to be counted and those that were not. On June 30, nearly eight months after the election, the Court upheld the three-judge panel's determination that Franken won by 312 votes. The Court rejected Coleman's claim that the three-judge panel had changed the standard for deciding whether to count absentee ballots, and concluded that in any event a change in the standards for deciding whether to count absentee ballots would not violate the right to substantive due process upon which Coleman had based his claims, unless the change was shown to be "patently and fundamentally unfair."<sup>17</sup> The Court also rejected Coleman's



equal protection claim, acknowledging that while some procedures might have varied somewhat across jurisdictions, there was no claim or showing of intentional discrimination and the level of variation that did exist appeared to be mostly due to differences in technology and resources across jurisdictions.

One week later, on July 7, 2009, Franken was sworn into office.

## **HOW WELL DID MINNESOTA PERFORM?**

Overall, Minnesota performed well in resolving a statewide election contest in a race with an approximately 0% margin of victory out of 2.9 million ballots cast, although the contest could have been resolved more quickly. The final result of 312 votes in favor of Franken differed from the first certified count by only 518 votes, or approximately 0.00018% of the total, and both Minnesota's mandatory post-election audit and the subsequent hand recount showed that the state's all-optical scan voting machines were working accurately. Although the candidates initially challenged some 6,600 in-person ballots during the hand recount, they agreed to drop all but 1,500 of those before the State Canvassing Board even had to consider them.<sup>18</sup> This compares quite favorably to the 97,000 challenges that occurred in Minnesota's disputed 1962 gubernatorial election, which itself was considered a model to be emulated.<sup>19</sup> For a fuller discussion of that contest, see our previous book.<sup>20</sup>

It is also impressive that, although the contest exposed various instances of human error, the eight months of post-election proceedings revealed no evidence or even allegations of voter fraud or other intentional misconduct aimed at affecting the result. This is true even though in 2008 approximately 542,000

Minnesotans voted using Election Day Registration ("EDR"), which in other states has become a target for those who claim that EDR is insecure and leaves the door open to substantial fraud. Arguments against EDR also overlook the fact that, while EDR may not be perfect, it does free states from HAVA's difficult-to-administer and controversial provisional balloting requirements. Thus, Minnesota and other EDR states have avoided the litigation and likely disenfranchisement seen in Ohio and other states that are highly dependent on provisional voting.

Overshadowing these policy considerations is the degree of nonpartisanship with which Minnesota conducted the recount and associated lawsuits. The State Canvassing Board, local election officials, the Secretary of State, the three-judge panel appointed to hear the election contest, and the Minnesota Supreme Court demonstrated that they have the ability to put party differences aside and engage in practical problem-solving to resolve post-election disputes. This problem-solving attitude is not primarily attributable to any formal legal checks on partisan election administration like those that exist in some other states. The Minnesota Secretary of State is an elected partisan, the State Canvassing Board is appointed by the Secretary with no formal check on partisan affiliations, the three-judge election contest court is appointed by the state Supreme Court with no constraints as to its partisan composition, and the Minnesota Supreme Court is itself an elected body that may be as partisan as the voting public allows. Nevertheless, all of these actors conducted themselves with professionalism, seemed to have avoided internal squabbles, and throughout the proceedings maintained public trust. Thus, the success of the recount and contest proceedings has less to do with formal

checks and balances, and more to do with Minnesota's healthy civic culture of treating each other fairly and working together for the public good.

However, the state has room for improvement. One area of particular concern is promoting the value of finality: it took Minnesota nearly eight months to determine the winner of its 2008 U.S. Senate race. The initial count and recount phases of the post-election proceedings cannot be blamed for this, because they concluded on January 5, well before new Senate members were sworn in on January 15. Rather, some of the blame lies with a state law that prohibits an official certification of the winner until the conclusion of any recount or election contest.<sup>21</sup> Franken challenged this rule both in front of the State Canvassing Board and the state Supreme Court by asking the state to issue a "provisional" election certificate, but his arguments were rejected on the grounds that they had no statutory basis. Two solutions to this finality issue are discussed below in the Suggested Reforms section.

Another area where Minnesota could have done better is its handling of rejected absentee ballots. Under Minnesota law that has since been changed, determinations of whether to count absentee ballots were made by the local poll workers in Minnesota's polling places. Under this extreme level of decentralization, it is unreasonable to expect every ballot to be treated the same way. Indeed, in the U.S. Senate race, about 11%, or 1,284 out of the 12,000 absentee ballots rejected statewide, were eventually counted after it was determined that they had been improperly rejected. These acknowledged errors lent credibility to Coleman's corollary claim that some of the approximately 300,000 absentee ballots cast statewide had been wrongly

*accepted*, although because of legal missteps Coleman lost his chance to try to substantiate that claim.

Yet the weakest part of the Minnesota process was not the variation in the initial decision whether to count absentee ballots, but the delay and confusion that ensued as the state attempted to fix those variations. Rules governing both how those variations should be remedied and who was in charge of the process were either nonexistent, or not understood by many who needed to understand them to conduct an orderly process. For instance, the State Canvassing Board initially said on November 26 that it would not examine rejected absentee ballots at all in the recount because that was the province of the election contest court.<sup>22</sup> Nevertheless, on December 12 the Board told local administrators that they could, if they so desired, reexamine rejected absentees and either count them or save them in a separate pile for later examination. This change of position created confusion in two ways. First, although the decision was intended to remedy variations in the application of absentee balloting rules, it actually exacerbated the potential for variation by having each of Minnesota's 87 counties separately apply a standard that the single election contest court could have applied later with complete uniformity. Second, based on the advice of their attorneys, many of the largest and most sophisticated jurisdictions initially refused to participate in this process, leading to uneven administration.<sup>23</sup> Coleman used the ensuing confusion to argue that the absentee balloting process was unfair and inaccurate. Whether or not that claim was true, it would have been better to preclude it from even being made by centralizing the process to promote uniformity and creating a

single counting location where the candidates could observe the treatment of all ballots.

The Minnesota Supreme Court exacerbated the confusion in response to Coleman's lawsuit<sup>24</sup> complaining that the state's 87 counties were not treating absentee ballots uniformly and asking the court to order counties to stop touching absentee ballots until the election contest court could decide how to handle them. Although the court generally agreed with Coleman that the counties had no right to re-examine the rejected ballots during the recount, it created an exception that allowed the counties to count ballots that the candidates agreed should be counted. While on its face this seems a common-sense way to reduce disputes, in fact the exception was administered in a way that actually intensified disputes. Because the court failed to specify just how this process should be conducted to ensure uniformity and transparency, the parties had to develop the process on their own and ended up back in court on Coleman's allegation that different counties were using different standards to decide which ballots to forward for the candidates' review. This created the possibility that some ballots that both candidates would have deemed countable would not be counted because they were never forwarded and the parties were never apprised of their existence. The issue became still more confused when the three-judge election contest panel issued the February 13<sup>th</sup> order that clarified the statutory rules for counting absentee ballots by dividing the forwarded ballots into nineteen different categories, prompting Coleman to claim the court was changing the rules in the middle of the game. Although the Minnesota Supreme Court would later rule that the trial court's order "closely tracked" the written rules and therefore did not constitute a change, the order nevertheless provided a *clarification* of the

rules that ideally should have occurred much earlier in the process.

All of this is not to say that Minnesota handled the absentee issue poorly compared to how it would have been handled in other states. In fact, even though the process was somewhat disorganized and made up largely on the fly, Minnesota likely handled the issue much better than most other states would have. It is troubling to think how a process like this would have played out in Ohio, where three times as many absentee ballots ordinarily are cast and stakeholders in the elections process may be more contentious.

As a final note, it is important to recognize the role that experience played in bringing the 2008 Minnesota Senate race to a felicitous end. The state had conducted a statewide recount just a few months before, in the primary election, and so recount procedures were fresh in the minds of many officials and workers who examined ballots. Furthermore, the Secretary of State had predicted prior to the general election that the Coleman-Franken race would result in a recount, and so began preparing officials for a possible recount even before the election. The state benefited from having a chief election authority who locals respected and obeyed, and a manageable number of election jurisdictions, compared for instance with Wisconsin's approximately 1,800 municipal authorities, further enhancing uniformity.

## **SUBSEQUENT LEGISLATIVE ACTION**

The 2008 election suggested several needed reforms to Minnesota's election system, and we were pleased to see that in early 2010 the Minnesota legislature passed many of these into law. Furthermore, the Secretary of State has recently made important changes

to administrative code sections governing absentee ballots and other areas. In addition to these changes, the Democrat-Farmer-Labor (“DFL”)-led legislature passed a number of reforms later vetoed by Republican Governor Tim Pawlenty, including a bill authorizing automatic voter registration for all those applying for driver’s licenses who do not opt out of registration<sup>25</sup> (HF 1053) and requiring the state to notify felons explicitly when their voting rights are removed or restored. As of this writing, a Republican measure requiring photo ID for in-person voting is nearing the newly elected Democratic Governor Mark Dayton’s desk, and is expected to be vetoed as well.<sup>26</sup>

Below in Table One is a brief outline of important changes since 2008, which pertain primarily to absentee balloting, recordkeeping and recount procedures, followed by some suggestions for further reform.

**Absentee changes.** The legislative changes summarized in the preceding outline focus primarily on absentee balloting. Largely in response to the federal Military and Overseas Voter Empowerment (“MOVE”) Act passed by Congress in late 2009, absentee balloting in Minnesota will now begin 46, rather than 30, days before the election. Completed absentee ballots must include an identification number, such as a driver’s license or social

**TABLE ONE: IMPORTANT STATUTORY CHANGES TO MINNESOTA ELECTION LAW**

Bill	Impact
S.F. No. 2251	<ul style="list-style-type: none"> <li>• Moves federal primary from September to August to leave more time for uniformed and overseas voters to vote. M.S.A. § 204D.03.</li> <li>• Extends the period of absentee voting from 30 to 46 days before the election. M.S.A. § 204B.35.</li> </ul>
H.F. 3108	<ul style="list-style-type: none"> <li>• Fleshes out procedures for cleaning voter registration database by comparing it to other databases. M.S.A. § 201.155 et seq.</li> <li>• Requires local administrators to forward absentee voting statistics to the Secretary of State for compilation. M.S.A. § 203B.19.</li> <li>• Requires local administrators and poll workers to keep detailed records of and investigate discrepancies in the number of regular and absentee ballots delivered to each precinct and the number of duplicate, makeshift, or unused ballots in each precinct at the end of election night. M.S.A. §§ 204B.28, 204C.24. Limits the scope of recounts to protect against accidental double-counting of original and remade ballots.</li> </ul>
H.F. 3111	<ul style="list-style-type: none"> <li>• Requires absentee ballot applicant to provide driver’s license number, state ID number, SSN-4, or statement that applicant has none of these. M.S.A. § 203B.04.</li> <li>• Requires detailed recordkeeping on absentee ballots requested, sent out, and cast. M.S.A. § 203B.065. Officials must keep a record of ballots that are not counted and why. Requires that absentee ballot envelopes, though not the ballots themselves, include a bar code to facilitate recordkeeping.</li> <li>• Requires that absentee ballots be canvassed and counted centrally by bipartisan absentee ballot boards, rather than in the polling place. M.S.A. § 203B.121. Officials must notify voters if their ballots are rejected. Prescribes detailed accounting and security procedures for absentee ballots after counting.</li> </ul>

security number—a first in Minnesota. But the most important changes deal with who counts absentee ballots and the extent to which records are kept regarding the counting process. Where Minnesota used to allow administrators to count absentee ballots in the polling place on election night, the count is now centralized under absentee ballot boards in each county. The members of these ballot boards, appointed in bipartisan pairs by the local election administrator, receive special training and have no responsibilities except for counting absentee ballots. Furthermore, their location in one central place facilitates communication and supervision and should result in greater uniformity than was achieved in 2008. A similar centralization process seems to have improved operations in other jurisdictions outside Minnesota, notably Milwaukee. However, the Minnesota law goes further than Milwaukee’s by requiring that these absentee ballot boards keep detailed records of the number of absentee ballots received, counted, and rejected, along with the reasons why. Ballot envelopes, though not ballots themselves, will be outfitted with a bar code system that facilitates this recordkeeping. Furthermore, the recordkeeping requirements extend beyond the absentee ballot board itself and include detailed chain-of-custody procedures at the county and Secretary of State level. These rules will increase the amount of information available to courts in the event of an election contest and, hopefully, the degree of certainty the public can feel in the result reached in such contests.

***Changes to the scope of recounts.*** Minnesota also has made small but important changes to its recount process. These changes are a response to confusion in 2008 over what kinds of questions should be considered in a recount

rather than a subsequent judicial contest of the result. The new law attempts to limit the scope of recounts to include only examination of the votes counted on election night, and to exclude examination of any ballots, such as initially rejected absentee ballots, that were excluded from the election night count. The changes also dictate that only original ballots, not “remade” ballots of the kind that figured into one of Coleman’s allegations, be included in the recount, to prevent double-counting. The new law also requires accounting procedures for these remade ballots to help administrators identify how many of them were created in each precinct.

This attempt to separate absentee balloting questions from the recount should go a long way towards reducing the kind of confusion that occurred in the 2008 recount over who was responsible for deciding the fate of previously rejected absentee ballots. The ad-hoc negotiation between the parties, the State Canvassing Board, and the Minnesota Supreme Court about how to deal with absentee ballots only made the job of the election contest court more difficult. The new law provides much-needed clarity, although creative litigants may yet find ways to blur the lines again.

## **SUGGESTIONS FOR FURTHER REFORM**

***1. Provisional certificates of election.*** The easiest and most obvious additional reform of Minnesota’s election system is to change the state statute that prohibits authorities from certifying a winner until the completion of an election contest. The current statute appears to have been written with disputes over smaller, lower profile elections in mind, elections where fewer votes are cast and the impact of a delay in execution is lower. However, it is apparent

now that statewide elections take much longer to resolve and the state can ill afford to go without an important officeholder in the meantime. The simple change of permitting a provisional election certificate to be issued while the election contest goes forward would eliminate the risk of this happening.

Since 2008, Minnesota leaders have talked seriously about changing the law to allow provisional certificates, but ultimately no legislation was passed. And there are understandable reasons for not authorizing these provisional certificates, at least in some circumstances. Provisional certificates can confer an air of authority on a candidate, which then may be used to portray as a “sore loser” any challenger to the result. At a simpler level, it seems that the system whenever reasonable should refrain from putting into office, even temporarily, any candidate who did not actually earn the largest number of votes.

But lawmakers might consider a system in which provisional certificates are available for certain types of elections, and not others. Generally speaking, provisional certificates might be more important in connection with executive offices where, unless a provisional certificate is issued, no person would be authorized to keep the office going. In legislative and some judicial offices, where there are always other legislators or judges to carry on the work, provisional certificates might still be unavailable.

**2. Expedited election contests.** As an alternative or supplement to issuing provisional certificates of election, Minnesota might consider requiring election contests to end a certain number of days after an election. For instance, the legislature might decide that the state can go without a U.S. Senator for a month

or two, but after that point can no longer tolerate any further delay. The deadline might vary according to whether a legislative, judicial, or executive office was at stake, whether it was a statewide office, or other factors. The risk, of course, is that the court might not meet the deadline, but on average a firm deadline is likely to put positive pressure on the court and other parties and make them understand the need to act quickly. This pressure might even give candidates an incentive to stick to their best arguments and refrain from eating up the public’s time with long shot theories that have only a trivial likelihood of success.

**3. Early in-person voting.** Although Minnesota already has a low rate of absentee voting (its approximately 10% rate is roughly 1/3 of the absentee voting that exists in Ohio), this rate is still large enough to make absentee ballots an easy target for dispute in an election contest, as 2008 showed. In fact, some officials we consulted felt that Minnesota’s current lack of convenient voting options (no excuse absentees or early in-person voting) might be causing some voters to use the state’s traditional excuse-required absentee voting system despite not meeting all of the legal qualifications for use. Regardless of whether that is true, Minnesota should consider adopting early in-person voting to reduce the number of easily disputed absentees and provide more voting options for Minnesota voters.

**4. A clear, easy-to-follow rule to deal with the commingled ballots problem.** One of the vaguest areas of Minnesota election law, like the law of many other states, is what to do when ballots found to be ineligible have already been counted and mixed in with eligible ballots so that they can no longer be identified. Some states, such as Wisconsin, have statutory

procedures that guide officials in dealing with this “commingled ballots problem” in at least some situations.<sup>27</sup> Minnesota, however, does not, a potentially serious problem. If the Minnesota Senate race had played out slightly differently, the election contest court and the Minnesota Supreme Court would have had little guidance to go by.<sup>28</sup> Coleman did make the argument that both the remade versions and the original versions of some ballots had been counted, amounting to double-counting. But because the courts were able to dispose of this claim on procedural grounds, they never had to make a determination of the rule that should be used to resolve the commingled ballots problem. The courts might not escape this issue next time.



**TABLE TWO: TIMELINE OF COLEMAN – FRANKEN 2008 ELECTION CONTEST**

Nov. 4	Initial count shows Coleman ahead by 725 votes	Initial Count
Nov. 6	Coleman's lead down to 236 after errors discovered in Lake, Pine, and other counties	
Nov. 7	SoS Ritchie announces goal to complete recount by December 19	
Nov. 8	Coleman files lawsuit in Ramsey County District Court (St. Paul) to block 32 absentee ballots. Lawsuit rejected almost immediately.	
Nov. 10	<ul style="list-style-type: none"> <li>Local jurisdictions certify their results to state canvassing board</li> <li>Coleman submits statewide public records request for initial vote count records and subsequent revisions</li> </ul>	
Nov. 12	SoS, as member of state canvassing board, appoints remaining 4 members of board	
Nov. 13	<ul style="list-style-type: none"> <li>Franken files suit in Ramsey County District Court (St. Paul) seeking names of rejected absentee voters (Franken v. Ramsey County). Court grants request on November 19.</li> <li>Local officials watch SoS recount training provided by SoS via the internet</li> </ul>	
Nov. 17	<ul style="list-style-type: none"> <li>Franken begins contacting absentee voters in some counties directly in order to harvest their previously rejected ballots</li> </ul>	
Nov. 18	State Canvassing Board certifies 215-vote majority for Coleman	
Nov. 19	Hand recount of in-person ballots begins statewide	Recount
Nov. 26	State Canvassing Board unanimously rejects Franken's request that the recount include a review of rejected absentee ballots	
Dec. 5	SoS's goal date for completion of hand recount. Most in-person ballots are recounted by this date, with the notable exception of challenged ballots.	
Dec. 12	<ul style="list-style-type: none"> <li>State Canvassing Board decides to count 133 Minneapolis ballots that had been lost prior to recount, but that had been recorded on election day</li> <li>SoS instructs local administrators to locate any absentee ballots that might have been wrongfully rejected, and save them in a "fifth pile" for examination after the recount</li> </ul>	
Dec. 15	Coleman sues in the Minnesota Supreme Court, claiming that local election officials are not uniformly following the SoS's December 12 order to segregate wrongly rejected absentee ballots for later examination (Coleman v. Ritchie).	
Dec. 16	<ul style="list-style-type: none"> <li>State canvassing board begins consideration of ballots challenged during recount</li> <li>Franken sues Olmsted County to force counting of 27 previously rejected absentee ballots (Franken v. Olmsted County). The court says the upcoming election contest should decide the matter.</li> </ul>	
Dec. 18	Minnesota Supreme Court rules that wrongly rejected absentee ballots cannot be examined as part of recount. However, they may be examined in a later election contest lawsuit. (Coleman v. Ritchie)	
Dec. 19	<ul style="list-style-type: none"> <li>Coleman sues in Minnesota Supreme Court to prevent alleged double-counting in the recount of about 150 remade ballots (Coleman v. Minnesota State Canvassing Board). The court denies his request on December 25.</li> <li>Minnesota Supreme Court issues 3-2 decision requiring officials and both campaigns to agree on a uniform counting standards for determining whether previously rejected absentee ballots should be counted (Coleman v. Ritchie). Previously rejected absentee ballots that cannot be agreed upon cannot be counted until their status has been litigated in the forthcoming election contest.</li> </ul>	
Dec. 24	Minnesota Supreme Court orders counties to forward all absentee ballots they deem improperly rejected to the Secretary of State by January 2. The counties end up forwarding 1,346 ballots for counting, 933 of which are eventually counted by stipulation of the parties.	
Dec. 30	State Canvassing Board determines that, excluding any changes that will come from the 1,346 outstanding challenged absentee ballots, Franken holds a 49-vote lead	
Jan. 1, 2009	Coleman files emergency petition in Minnesota Supreme Court alleging agreed standards for deciding whether to count previously rejected absentee ballots are not being followed. He asks that none of the previously rejected absentees be counted until the forthcoming election contest.	



Jan. 3	SoS begins counting 933 previously rejected absentee ballots that both candidates agree should have been counted. At this time, the Minnesota Supreme Court had not yet considered Coleman's Jan. 1 complaint that standard procedures weren't used in selecting which ballots to forward to the SoS for consideration	Election Contest
Jan. 5	<ul style="list-style-type: none"> <li>Minnesota Supreme Court rules that rejected absentee ballots may be reexamined and counted if both candidates agree they should be counted. (Coleman v. Ritchie)</li> <li>State Canvassing Board certifies the result of the recount. Franken comes out ahead by 225 votes.</li> </ul>	
Jan. 6	Coleman files election contest in Ramsey County District Court (Coleman v. Franken)	
Jan. 12	Minnesota Supreme Court justice Alan Page appoints three-judge panel to hear election contest.	
Jan. 13	Franken sues Gov. Pawlenty and SoS Ritchie in the Minnesota Supreme Court to force them to issue certificate of election (Franken v. Pawlenty). On March 6, the state Supreme Court issues an opinion that says there is no basis for issuing such a certificate prior to when the true winner has been determined by an election contest lawsuit.	
Jan. 23	Oral arguments on cross motions for summary judgment	
Jan. 26	Election contest trial begins in Ramsey County.	
Feb. 3	<ul style="list-style-type: none"> <li>Election contest court rules that Coleman may present evidence on some 4,800 absentee ballots that Coleman claims should have been counted.</li> <li>Parties stipulate that 933 previously rejected absentee ballots were improperly rejected and were properly counted in the</li> </ul>	
Feb. 10	Election contest court orders both candidates to file briefs on whether the court should count nineteen different categories of absentee ballots that were previously rejected.	
Feb. 13	Election contest court holds that the previous rejection of 12 of the nineteen categories of absentee ballots was correct and that the ballots should not be counted. Coleman alleges that several absentee ballots that fell into these categories had already been counted. But the court rejects Coleman's request to reconsider the ballots because Coleman had already stipulated that they would be counted. Coleman also withdraws roughly one thousand ballots from consideration, leaving only 3,687 rejected absentees before the election contest court.	
Feb. 20	Coleman files brief arguing that absentee ballots that were not eligible to be counted under the election contest court's February 13 order were, in the original election night count, taken out of their envelopes and inseparably commingled with eligible ballots.	
Feb. 24	Coleman argues in court that some absentee ballots—ones that had been rejected in the original count because the voter also cast a ballot in person—were erroneously counted in the subsequent recount. Two days later, Franken files a brief arguing against trying to “uncount” any problematic ballots that might have made it into the count.	
Mar. 2	Coleman attorney sends letter to three-judge panel citing authority for using random withdrawal as a remedy for illegal ballots that have been mixed in to the count, and citing authority for ordering a new election when the result cannot be determined.	
Apr. 7	Three-judge panel examines and counts 351 previously rejected absentee ballots. Franken benefits more than Coleman.	
Apr. 13	<p>Three-judge panel resolves contest in favor of Franken.</p> <ul style="list-style-type: none"> <li>133 ballots missing from Minneapolis since election day will count because there is no evidence of fraud or that the ballots should not have been counted on election day.</li> <li>Coleman was barred by laches and estoppel from complaining of double-counted remade ballots.</li> <li>Court will not count invalid absentee ballots just because some such invalid ballots may have been erroneously counted earlier in the process.</li> </ul>	
Apr. 20	Coleman appeals.	
June 30	Minnesota Supreme Court affirms verdict of three-judge panel.	

## REFERENCES

<sup>1</sup> Records suggested that 133 Minneapolis ballots had been counted on election night but had become lost sometime prior to the recount. There was no evidence or suggestion of fraud. Despite the lack of physical ballots to recount, the State Canvassing Board included them in the recount result, a decision that was later upheld by the election contest court because to all appearances the ballots were valid and had been properly recorded in the initial count. See Findings of Fact, Conclusions of Law, and Order for Judgment at 20, *Coleman v. Franken*, No. 62-CV-09-56 (Minn. Dist. Apr. 13, 2009), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/MNfinalorder.pdf>.

<sup>2</sup> These were the so-called “re-made” ballots that scanners could not read on election night because of tears and other various physical defects. State law instructs poll workers encountering such ballots to hand-copy the votes cast on them to fresh, undamaged ballots, which are then run through the scanner like ordinary ballots. However, Coleman alleged that, while these ballots had been properly counted in the initial count, because of poor ballot preservation practices they had been mixed together with all the other ballots after election night and then double-counted during the subsequent hand recount. The Minnesota Supreme Court ordered that the issue not be considered as part of the recount, but instead could be considered only in an election contest. The election contest court decided that the doctrine of laches prohibited Coleman from raising his claim regarding the double-counting. Specifically, Coleman had waived any right to complain when he agreed to the State Canvassing Board’s written recount procedures that made no accommodation for the possibility that damaged ballots and remade ballots could be counted, and waited to raise the issue until most of the hand-count had already been completed. In the end, the election contest court would estop Coleman from complaining of any potentially double-counted votes because it said he had waited until too late in the process to complain of such errors. Furthermore, as an aside, the court would reject Coleman’s suggestion that statistical methods might be used to “uncount” such potentially invalid ballots that had been inadvertently counted and mixed in with valid ballots so that they became unidentifiable.

<sup>3</sup> Edward B. Foley, *The Lake Wobegone Recount: Minnesota’s Disputed 2008 U.S. Senate Election*, 10 ELECTION L. J. 129 (2011).

<sup>4</sup> JAY WEINER, THIS IS NOT FLORIDA: HOW AL FRANKEN WON THE MINNESOTA SENATE RECOUNT (2010).

<sup>5</sup> MINN. STAT. ANN. § 204C.35 (West 2011) (any statewide race that falls within a ½% margin of victory automatically goes to recount under state law).

<sup>6</sup> In Mountain Iron (St. Louis County), Franken gained 100 votes. Mountain Iron officials explained that the change came because the original count had been called in by phone from the precinct. After officials had a chance to review the actual election night records, they caught the error. Janna Goerd, *National Media Question Northland Votes*, DULUTH NEWS TRIBUNE, Nov. 12, 2008, at Elections, available at Westlaw, 2008 WLNR 21662880. Franken also gained 246 votes in Two Harbors (Lake County). Officials explained that an election worker had mistakenly entered 27 votes for Franken, rather than the actual 273. *Id.* Finally, Franken picked up 100 votes in Pine County, where voters in one precinct cast 129 votes for Franken, but it was initially recorded as 29 votes due to a data entry error. Jason Hoppin, *One “Really Ugly” Recount*, ST. PAUL PIONEER PRESS, Sept. 13, 2009, at A1.

<sup>7</sup> When asked about Coleman’s criticism of election officials, Ritchie stated that the Coleman campaign’s goal was “to win at any price” and to cast a “cloud” over the election. Don Davis, *Coleman Suspicious of Iron Range Vote Count*, DULUTH NEWS TRIBUNE, Nov. 8, 2008, at Elections, available at Westlaw, 2008 WLNR 21365484.

<sup>8</sup> Jason Hoppin & Rachel E. Stassen-Berger, *Coleman’s Lead at 206—And Now the Recount*, ST. PAUL PIONEER PRESS, Nov. 11, 2008, at A1.

<sup>9</sup> *Franken for Senate v. Ramsey County*, No. 62-CV-08-11578 (Minn. Dist. Nov. 13, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/franken.v.ramsey-county.php>.

<sup>10</sup> Greg Giroux, *Minnesota Senate Timeline*, CQ TODAY, July 7, 2009, available at Westlaw, 2009 WLNR 13273247.

<sup>11</sup> See Rachel E. Stassen-Berger, *Coleman Asks Judge to Halt Count of 32 Votes: Minneapolis Absentee Ballots in Official’s Car Valid, City Attorney Says*, ST. PAUL PIONEER PRESS, Nov. 9, 2008, at A1. The Franken suit is *Franken v. Olmsted County*, No. 55-CV-08-11879 (Minn. Dist. Dec. 18, 2009), available at <http://moritzlaw.osu.edu/electionlaw/litigation/franken.v.olmsted-cty.php>.

<sup>12</sup> *Coleman v. Minn. State Canvassing Bd.*, 759 N.W.2d 44 (Minn. 2008).

<sup>13</sup> *Franken v. Olmsted County*, at <http://moritzlaw.osu.edu/electionlaw/litigation/franken.v.olmsted-cty.php> (rejecting Franken’s argument that previously rejected absentee ballots should be considered during the recount).

<sup>14</sup> MINN. STAT. § 203B.12 (2008).

<sup>15</sup> Kevin Duchshere & Pat Doyle, *Rhetoric Over Senate Trial Gets Angrier*, STAR TRIBUNE (Minn.), Feb. 21, 2009, at 01B.

<sup>16</sup> See *Berg v. Veit*, 162 N.W. 522, 523 (Minn. 1917); *Hanson v. Emanuel*, 297 N.W. 749, 755 (Minn. 1941).

<sup>17</sup> *Coleman v. Franken*, 767 N.W.2d 453, 459 (Minn. 2009).

<sup>18</sup> Rachel E. Stassen-Berger & Jason Hoppin, *Absentee Ballots Get Court Hearing Today*, ST. PAUL PIONEER PRESS, Dec. 17, 2008, at A7.

<sup>19</sup> See RONALD F. STINNETT & CHARLES H. BACKSTROM, RECOUNT (1964).

<sup>20</sup> STEVEN F. HUEFNER, *ET AL.*, FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 140-41(2007).

<sup>21</sup> MINN. STAT. ANN. § 204C.40 (West 2011) (“In case of a contest, an election certificate shall not be issued until a court of proper jurisdiction has finally determined the contest.”).

<sup>22</sup> Brian Bakst, *Faulty Ballots Kept from Minn. Recount*, PITTSBURGH POST-GAZETTE, Nov. 27, 2008, at A10.

<sup>23</sup> Jason Hoopin, *Ballot Hunt Ends, Next Stage Begins: Missing-Envelope Mystery Yields to Feud Over Challenges, Absentee Ballots*, ST. PAUL PIONEER PRESS, Dec. 8, 2008, at A1.

<sup>24</sup> *Coleman v. Ritchie*, 759 N.W.2d 47 (Minn. 2009).

<sup>25</sup> *Automatic Voter Registration Vetoed*, ST. PAUL PIONEER PRESS, May 23, 2009, at B2.

<sup>26</sup> Eric Roper, *Voter ID-Card Bill Clears House*, MINNEAPOLIS STAR-TRIBUNE, May 6, 2011, at 1A.

<sup>27</sup> See WIS. STAT. ANN. § 9.01(1)(b)(4) (West 2011).

<sup>28</sup> *Cf. Hanson v. Emanuel*, 297 N.W. 749 (Minn. 1941); *Berg v. Veit*, 162 N.W. 522 (Minn. 1917).

## CHAPTER TWO: OHIO

OHIO'S ELECTION SYSTEM, which our original study labeled a "poster child for reform," is unquestionably in better condition than it was in late 2006. Much of the credit goes to the good government groups and other political players who brought attention to important policy issues—sometimes through litigation—and persuaded administrators to take action to address them. Some of the credit also goes to Ohio Secretary of State Jennifer Brunner, who after her election in 2006 took a more active role than previous Secretaries, and particularly guided Cuyahoga County, the state's most troubled election jurisdiction, through its first successful two-year election cycle since Congress's passage of the Help America Vote Act ("HAVA") in 2002. Nevertheless, many of Secretary Brunner's reforms were unilateral in nature and triggered a bevy of lawsuits from both sides of the political aisle. In addition, Ohio's election ecosystem remains vexed by conflicts over voter registration databases and absentee balloting, among other concerns. Thus, despite substantial improvement, Ohio election administration remains highly politicized. The improvement that would come from replacing an elected Secretary of State with an appointed, non-partisan chief elections officer is as great as ever.

The state's increasing reliance on absentee balloting over the past several years deserves special attention. 30% of ballots cast in 2008 were absentee, up from about 10% in 2004; in some Ohio counties the figure has approached 50%. This shift has important implications, as absentee ballots are becoming increasingly important targets of election litigation. Complicating this picture is the fact that recent amendments to Ohio's absentee balloting laws occurred without appropriate corresponding

changes to other laws that indirectly affect absentee balloting, which may no longer mesh with the new laws. Thus, in the lead-up to the 2008 election, Ohio witnessed many lawsuits concerning absentee voting, a trend that is likely to continue.

This chapter, like the others in this follow-up study, begins with an analysis of vulnerabilities in the Ohio election system that would be exposed in the event of a major post-election contest akin to Minnesota's 2008 U.S. Senate race. It then goes on to discuss the institution of the Ohio Secretary of State's office, and particularly the performance of Secretary Brunner. It concludes with a discussion of the rise in absentee balloting. A separate section describes Ohio's extensive election litigation since 2007.

### HOW WOULD OHIO HANDLE A HIGH-PROFILE ELECTION CONTEST?

If circumstances roughly analogous to those of Minnesota's 2008 U.S. Senate race occurred in Ohio, the state likely would not handle them nearly as well. For starters, since 2006 Ohio has had a statute that deprives Ohio courts of jurisdiction over statutory election contests involving *federal* candidates. Nevertheless, as we noted in our original study,<sup>1</sup> a federal candidate might attempt to invoke some other basis for state court jurisdiction. Accordingly, if the hypothetical contest involved a federal office, a threshold problem would be determining where and over what issues the contest would be fought.

In addition, although Ohio has greatly improved its election operations and addressed certain types of litigation risks, such as malfunctioning

voting machines and long lines at polling places, it has not reduced the huge number of provisional ballots cast each election—the system’s greatest weakness, discussed at length in our previous book. In contrast with Minnesota and Wisconsin, Ohio does not have a mechanism like Election Day Registration that can reduce or eliminate the need for provisional ballots, and act as a safeguard against disenfranchisement of voters who registered properly but whose registrations, for whatever reason, are not showing up in poll books. Another important weakness is that Ohio has significantly *increased* its reliance on absentee ballots. These ballots, although an elegant solution to some administrative problems, provide candidates additional opportunities to file election contests, as the Minnesota experience demonstrated. While disputes over absentee ballots in Minnesota helped to keep its U.S. Senate race in legal limbo for almost eight months, in Ohio this kind of dispute might drag out even longer, and its resolution would stand a slimmer chance of attaining the same level of public acceptance that Minnesota attained.

One form that absentee ballot litigation could take would be to challenge voters who had not submitted proper requests for absentee ballots, as in *State ex rel. Myles v. Brunner*, a case described in greater detail in the absentee balloting section below. However, if Minnesota is instructive, challenging whether proper requests have been submitted is not the most promising avenue of attack. The requests have already been submitted, ballots have been cast and counted, and the votes themselves have been comingled with numerous valid votes. At that point it is difficult to remedy invalid absentee ballot requests, aside from throwing

out the result and holding another election, which courts are very reluctant to do.

For the same reason, litigation questioning election night decisions to count absentee ballots is also unlikely to succeed. Again, even if ineligible ballots were counted, it is too late to correct the error unless it is so sweeping as to necessitate calling a new election. In Minnesota, when Coleman tried to argue that ineligible ballots were improperly counted, the trial court ruled that Coleman was precluded from making this argument because he had waited too long to raise it. Yet even if Coleman had raised this issue earlier, he probably would not have gotten far because the ballots were already counted and inseparably mixed together so that a court would have difficulty remedying the problem. Ohio courts faced with this “commingled ballots” problem would be in an even more difficult position than Minnesota’s courts, because Minnesota at least has a few court precedents to draw upon, while Ohio has none. Under these circumstances, the courts would have little recourse, in the absence of a truly massive number of ineligible ballots that had made it into the count, other than to say that no process is perfect and that whatever level of error occurred in the process would just have to be tolerated.

By process of elimination, this means a dispute over Ohio absentee ballots would probably focus on the same issue central to the Minnesota litigation: absentee ballots not yet counted because they were initially rejected on election night. The contestant would argue that these ballots were improperly rejected and should still be included in the count, while the contestee would argue that the original determinations of ineligibility were correct and that the ballots should stay out of the count,

except perhaps in counties where the contestee fared particularly well. The arguments would center on section 3509.07 of the Ohio Revised Code, an Ohio statute entitled “rejection of absentee vote.” This statute indicates several reasons why an absentee ballot should be rejected, including, but not limited to: a) the accompanying paperwork is “insufficient”; b) the signature on the paperwork does not match the signature on file; c) the applicant is not registered and eligible; or d) the voter failed to provide the required identification (driver’s license number, SSN-4, or photocopy of a form of ID that would be acceptable at the polls).

These rules may seem reasonably clear, but they have never been interpreted by a court, and it is notable that Ohio’s provisional ballot-counting rules also seemed reasonably clear prior to the *State ex rel. Skaggs v. Brunner* litigation described below, which exposed significant ambiguity. Where the provisional ballot statutes that gave rise to that litigation were overly verbose and complicated, the absentee balloting statute may suffer from the opposite flaw: it says ballots should not count where the statement is “insufficient,” but does nothing to define the meaning of that term.<sup>2</sup> This vagueness leaves courts wide discretion. A court might take a strict and formal approach to the problem, as in *Skaggs*, and invalidate ballots because, for instance, the voter failed to include a block-letter name, even though the voter provided a legible signature, proper identification, and enough other information to allow the Board of Elections to determine the voter was registered and eligible. On the other hand, courts might take a less strict and formal approach, particularly because absentee ballots must come with proper identification that might make the court more comfortable with counting the ballots.

A separate issue that might be an attractive target for litigation is the intersection of Ohio’s absentee balloting laws with HAVA’s ID requirements. Specifically, regardless of state law, HAVA requires most first-time voters who registered by mail to provide an acceptable form of ID.<sup>3</sup> In Ohio, this requirement is moot with respect to in-person voters because state voter ID requirements are stricter than the federal requirements and any voter who complies with the state requirements will also satisfy the federal ones. However, that is not true in the case of absentee voting: Presentation of a driver’s license number or SSN-4 on the absentee ballot paperwork is sufficient identification under Ohio law, but not under HAVA. Nevertheless, at least some county Boards of Election, including the Board in Cuyahoga County,<sup>4</sup> are instructing absentee voters that it is sufficient identification if they just provide their driver’s license or SSN-4 on their absentee ballot paperwork, which simply is not correct. To satisfy the federal requirement, which applies equally to in-person or absentee voters, voters must present an actual document or a copy of a document, not just an identification number.

**Cultural factors.** A Minnesota-type lawsuit would unfold less well in Ohio not only, or even mostly, because of “hard” factors like ambiguous laws or actual maladministration, but also because of “soft” factors such as the subjective judgments and intentions of individual players in the Ohio elections system. Ohio is rife with elections litigation today not only because it is a swing state with a history of administrative difficulty, but also because past election litigation has bred more litigation and changed Ohio into a more litigious place. Because of this history of elections litigation, it is safe to say that in Ohio the two major political



parties are more adept at identifying potential causes of action, and more likely to actually file suit over causes of action they have identified.

Admittedly, much of the elections litigation in Ohio has resulted in improvements to the day-to-day administration of state elections, and on the surface it might seem that having a highly skilled set of elections analysts—both administrators and attorneys—also would enhance, rather than limit, the chances of a well-conducted post-elections dispute. However, the number of latent problems in the Ohio system means that it likely would not stand up well to the intense scrutiny of a Minnesota-type contest. It is harder to imagine, for instance, an Ohio election attorney stipulating to many of the facts and legal conclusions that Coleman’s team did, which smoothed the way for the Minnesota proceedings. Instead, the Ohio culture would be to litigate much more aggressively.

Any hope that experience and knowledge would help, rather than hinder, a swift and just conclusion of an election contest in Ohio also overlooks the different ways in which experience and knowledge can be used. Although the litigation in Minnesota proceeded with some decorum largely because of the state’s moderate politics and tradition of bipartisan cooperation, in Ohio election administration is something of a high-stakes political contest where players are looking not only for legal victories but also to score political points. Therefore, instead of being future-oriented and focusing on reaching a just result, parties to an election contest in Ohio might very well focus instead on finger-pointing or trying to take down whatever Secretary of State was in office, no matter what the cost, even if it resulted in unfairly discrediting large parts of the election system.

## INSTITUTIONAL ARRANGEMENTS

Our original study noted that many Ohio election administrators and others in the election community had been critical of leadership of Secretary of State Kenneth Blackwell concerning matters of election administration during his tenure from 1999 to early 2007. At that time, the new Secretary of State, Jennifer Brunner, had begun her administration with a more engaged approach, but one that risked intensifying what Loyola Law School professor Rick Hasen has referred to as the “election administration wars” that have afflicted Ohio and other states. Secretary Brunner has now completed her term, having both made significant improvements to Ohio’s election system, yet also failed to reduce – and perhaps even increased – the amount of controversy surrounding elections.

***Significant improvements.*** Secretary Brunner was indisputably an active Secretary of State who brought significant change to the system. She hired a group of administrators and computer experts to conduct an extensive “top to bottom” review of the state’s voting technology and then used the results to push for significant change.<sup>5</sup> She forced the resignation of all four members of the Board of Elections of Cuyahoga County, perhaps Ohio’s most troubled election jurisdiction, put the county on “administrative oversight,” and forced it to replace its touchscreen voting machines with a paper ballot system.<sup>6</sup> Meanwhile, Brunner required other touchscreen counties to prepare paper ballots that could be used in the event of touchscreen failure to keep voting lines moving.<sup>7</sup>

Secretary Brunner also made significant efforts to study and learn from important elections.

She issued a post-election review of the March 2008 Presidential primary,<sup>8</sup> and after the 2008 general election held a well-attended “Elections Summit” that brought together hundreds of administrators, legislators, community group leaders, and academics to discuss the election and what improvements could be made. An extensive report was issued as part of the Summit. Brunner also settled a major, comprehensive elections lawsuit, *League of Women Voters v. Blackwell*<sup>9</sup> (which she had inherited from her predecessor) on terms that appear likely to result in significant improvements to the system, once they are fully implemented.

Secretary Brunner succeeded in getting introduced an important House elections bill that would have addressed a number of issues with Ohio’s current election statutes if it had been passed into law. The version of the bill passed by the House on November 18, 2009, included many common-sense ideas for improving elections. Chief among these was a simplification of Ohio’s labyrinthine provisional ballot statute, which the Ohio Supreme Court once called a “quagmire of intricate and imprecisely stated requirements, including internal inconsistencies....”<sup>10</sup> The new bill would have attempted to make things more straightforward by focusing the decision of whether to count a provisional ballot on two factors: 1) whether the voter was registered and eligible and 2) whether the voter provided a signature that substantially matches the one contained in registration records. The bill would also have modified existing law so that provisional ballots cast in the wrong precinct but in the correct county would count for eligible offices.

The bill also would have simplified what types of identification are valid at the polls. Most types of state-issued photo ID would continue to be valid at the polls. However, the bill eschewed the alternative in current law that gives voters who do not have valid photo ID the option of providing a military ID, a current utility bill, a current bank statement, a current government check, a current paycheck, or a current government document with the name and current address of the voter. Instead, the new bill would not require voters lacking photo ID to produce any identifying documents at all, but would permit the voter to simply sign an affirmation that they are registered and eligible.<sup>11</sup> As long as the signature provided on the affirmation matches the one contained in the poll book, the voter would be able to cast a regular ballot. This affidavit system is similar to one that has been used in Michigan for several years without incident (and only by a small number of voters). It would be easier for poll workers to understand than the current identification requirements that have had to be clarified through repeated litigation.

Other important parts of the bill included revising the face of state driver’s licenses to remove internal tracking numbers that voters often have mistaken for their driver’s license numbers.<sup>12</sup> In the past, some voters have accidentally provided this tracking number rather than their driver’s license number when applying for absentee ballots or participating in other voting procedures. Finally, the bill included provisions to expand the number of early voting locations in each county,<sup>13</sup> provisions to allow for online registration for voters with signatures already on file with the state motor vehicles department,<sup>14</sup> and provisions to automatically register to vote all individuals who have current driver’s licenses



or state IDs on file with the Bureau of Motor Vehicles, unless an individual opts out.<sup>15</sup> The Ohio Senate created a more limited bill that did not include the changes to provisional voting and voter ID, but ultimately the legislature could not find enough agreement to pass any of these changes into law. Still, H.B. 260 provides a roadmap to changes that may occur with future legislation, changes that, on the whole, would have produced improvement. Some election administration changes are likely to occur in 2011 under the new leadership of Secretary of State Jon Husted, as other election reform bills are moving through the legislature.

**Criticisms.** Despite the systemic improvements she has brought, Secretary Brunner has done little to ameliorate Ohio's recent tendency to turn elections into an opportunity for squabbling and litigation. Brunner, a former judge, was perceived by some to be heavy-handed, and alienated some local election administrators. She was also extremely unpopular in Republican quarters and, like her predecessor, became something of a target for political attacks and lawsuits. Although that is likely in part because Brunner forced the system to improve in important ways, it also means that she was unable to address, and may even have exacerbated, the critical problem of lack of trust in the system and its leaders.

A prime example of Secretary Brunner's perceived heavy-handedness is the way she dealt with Cuyahoga County, perhaps Ohio's most troubled election jurisdiction, shortly after she came into office in 2007. Prior to her arrival, the county had experienced a number of recent elections difficulties, including problems in the 2006 federal primary election, when 20% of polls opened late;<sup>16</sup> the 2006 federal general election, when approximately

12,000 voters failed to sign in before voting;<sup>17</sup> and, quite disturbingly, when two county election officials deliberately mishandled a recount, in what was ultimately found to be criminal conduct, to try to hide the fact that a substantial percentage of the paper voting records ("VVPAT's") generated by the county's touchscreen voting equipment were damaged and unrecountable.<sup>18</sup>

When Brunner came into office, she almost immediately forced all four members of the county's evenly bipartisan Board of Elections to resign and then, just two months before Ohio's March 2008 Presidential primary, pressured the new Board to scrap its touchscreen voting machines in favor of optical scan equipment that she considered more reliable. This latter move was controversial not only because the Board had only a few months to adjust to the new system and retrain workers, but also because ballots cast under the new system would not be fed by voters into voting machines in the precinct. Instead, the ballots had to be transported by workers to a central scanning facility for counting. The upshot was that, unlike the old touchscreen system, the new system did not allow voters to learn at the polling place at the time of voting if they had failed to mark their ballots correctly, giving them the opportunity to correct such errors. Concerns that this would lead to a number of unintentional over-votes and other errors prompted the ACLU to sue, unsuccessfully, for an injunction to force the county to use equipment that would address these concerns.<sup>19</sup>

Despite these worries, the primary went smoothly and before the November general election Cuyahoga County was able to move to a better system that included error correction. However, during the process, Brunner alienated some of the local election administrators that

a Secretary of State needs working diligently with her. Three of the four Board members she forced to resign vowed to fight her efforts to remove them, and one of them resigned only after Brunner initiated administrative proceedings against him, to which he responded by bringing an unsuccessful lawsuit against her.<sup>20</sup> The move to the optical scanning system was similarly filled with animosity: the four new members of the County Board deadlocked along party lines and only came to a decision because Brunner used her statutory power to break the tie vote.<sup>21</sup> After the deadlocked meeting, which Brunner did not attend, one Board member and Brunner exchanged public expressions of frustration with one another.<sup>22</sup>

These anecdotes appear to be part of a larger pattern of tension between Brunner and other players in the Ohio election community. Disputes over personnel changes were not limited to Cuyahoga County, for example, but also included similar disputes concerning a Board member in Summit County (Akron) and the executive director of the Franklin County Board of Elections.<sup>23</sup> By being aggressive where delicacy might have sufficed, Brunner may have prompted local election officials to passively or even actively resist her efforts where they otherwise might not have. Furthermore, some of the Board removals and other decisions angered powerful Republican leaders and may have caused some individuals in Republican

quarters to file lawsuits against Brunner that were based more on political animus than legal grievance. In short, Ohio’s statewide election administration remains undercut by partisan wrangling.

**A NEW WORLD OF ABSENTEE VOTING**

One of the biggest changes in Ohio election administration in the last few years is the rise of absentee voting. Following a national trend towards increased voter convenience, in 2006 Ohio changed its laws to permit voters to cast absentee ballots without providing a reason. Under this new regime, many county administrators have begun to promote in newspapers and other media the idea of absentee balloting as the preferred mode of voting. In response, the percentage of Ohio voters using this mode increased from approximately 17% in November of 2006 to nearly 30% in November of 2008,<sup>24</sup> and represented almost 45% of the vote in some counties (see Table Three below). While not all of those ballots were mail-in ballots (some of them were absentee ballots cast in-person at locations set up by the county Boards), these statistics nevertheless represent not only a dramatic shift in the *time* of voting, but also a shift to a *type* of voting that occurs largely in the privacy of the home.

This large-scale shift to absentee voting has many administrative implications, not all of

**TABLE THREE: PROPORTION OF ABSENTEE VOTERS IN URBAN OHIO COUNTIES**

Ohio County	2006 absentee proportions <sup>25</sup>	2008 absentee proportions <sup>26</sup>
Cuyahoga (Cleveland)	106,456/469,930 (23%)	273,123/672,750 (41%)
Franklin (Columbus)	103,119/385,863 (27%)	253,686/564,971 (45%)
Hamilton ( Cincinnati)	47,969/296,420 (16%)	111,445/429,267 (26%)
Summit (Akron)	33,165/205,714 (16%)	88,719/280,841 (32%)
Montgomery (Dayton)	23,609/219,153 (11%)	73,061/280,746 (26%)

**TABLE FOUR: ABSENTEE AND PROVISIONAL BALLOT REJECTION RATES  
IN URBAN OHIO COUNTIES**

	Cast	Counted	Rejected	Reject Rate
<b>Cuyahoga</b>				
Absentee	273,123	265,887	7236	0.026
Provisional	28,827	21,417	7410	0.257
<b>Franklin</b>				
Absentee	253,686	250,124	3562	0.014
Provisional	28,462	23,318	5144	0.181
<b>Hamilton</b>				
Absentee	111,445	108,872	2573	0.023
Provisional	19,530	15,523	4007	0.205
<b>Montgomery</b>				
Absentee	73,061	72,562	499	0.007
<b>Summit</b>				
Absentee	88,719	87,679	950	0.012
Provisional	8,192	6,667	1525	0.186

them initially apparent, as Ohio and other states are now learning. Absentee voting means greater convenience for voters, but it also means a greater chance that a particular ballot will not count. In 2008 the percentage of Ohio absentee ballots rejected ranged from 0.7 to 2.6% across counties (see Table Four above). One reason why a ballot might be rejected is that the voter failed to execute the accompanying paperwork properly, as when the voter fails to include a signature in the return paperwork, but there has been no systematic study to isolate the reasons for rejection and their incidence.

A separate issue is absentee ballots that are not rejected entirely, but are partially rejected because of residual votes (over- and under-votes). While precise data on the residual vote rates in the 2006 and 2008 elections also is not available, the increasing percentage of absentee ballots that are cast without the

benefit of voting machines that guard against residual votes means that the percentage of residual votes is probably higher than before.

In addition to these potential lost vote problems, absentee balloting in the last few years has proven fertile ground for litigation. This trend is likely to continue, for at least four reasons. First, like provisional ballots, absentee ballots are cast together with various supporting documents, usually called affidavits or affirmations, that record the steps of the voting process and can provide a basis for seeking to disqualify individual ballots in court. This level of documentation does not accompany ballots cast in polling places. Second, as noted, the number of absentee ballots at stake is greater than ever before. Absentee ballots represent about 30% of all ballots cast, while provisional ballots, which used to be considered a potential goldmine for litigation, represent only about 3.5%. For that reason, legal teams in close

racers are scrutinizing the absentee balloting process more than ever and have a greater chance to uncover flaws. Third, some absentee ballots are not counted on election night but are saved for later disposition, usually because of technical defects found in the ballot in the original election night count. In an election contest, candidates can go back and re-examine administrative determinations that these ballots were defective and therefore disqualified from the count. If they find evidence that the ballots were rejected for improper reasons, they may pick up some votes. This was part of the legal strategy of both candidates at various times in Minnesota's 2008 U.S. Senate contest.

But the fourth and perhaps the biggest reason why absentee balloting is an easy target for litigation in Ohio is that the statutory framework is largely inherited from a time when absentee ballots represented only a small percentage of the overall vote. Ohio was shown this time and again during the year leading up to the 2008 Presidential election, as suit after suit was filed to try to control the way absentee voting processes were conducted. Secretary Brunner stated her view that many of the statutes were outdated when compared with the realities of no-excuse absentee voting, and saw it as part of her duty to try to fit together disparate pieces of statutory language and case law that sometimes seemed to conflict with one another. The primary questions seemed to be how to fit the state's absentee voting statutes together with HAVA's database matching provisions, and whether a novel program of one-stop registration and in-person absentee voting during a brief window about one month before Election Day, which came to be known as Golden Week, was permissible under the law.

The main lawsuit addressing the impact on absentee voting of the HAVA matching issue was *Ohio Republican Party v. Brunner* (more fully described below), in which Ohio Republicans alleged that the Secretary of State was not performing a meaningful match of the information contained on incoming voter registration applications with information contained in Social Security Administration and state motor vehicle databases. Republicans not only wanted the court to order Brunner to conduct matching in a way that Republicans found meaningful, they also argued that this matching issue had a related implication for Golden Week. The state could not allow one-stop registration and voting during this period, the Republicans argued, because HAVA required that the data contained on voter registration applications be matched *prior* to voting. Because the Golden Week program allowed no time for the data on the registrations to be checked, it violated HAVA and could not go forward. Brunner responded that HAVA did not require matching prior to putting a voter on the registration rolls, and that at any rate a failed match, by itself, should not impair a voter's ability to cast a ballot.<sup>27</sup> In the end, the courts did not decide these arguments because the U.S. Supreme Court determined the plaintiffs were not sufficiently likely to have a right of action to justify letting the suit proceed.

A parallel case in the Supreme Court of Ohio, *State ex. rel. Colvin v. Brunner*, explored another aspect of the Golden Week voting period. In this suit, a voter claimed that state law required all voters to be registered for 30 days prior to voting, and that the one-stop registration and voting contemplated in Golden Week could not occur because it violated this rule. Brunner responded that the 30-day requirement was intended to apply only to in-

person voting, and that one-stop registration and voting could occur. The Supreme Court of Ohio agreed with Brunner's interpretation and added that even if they had not ultimately agreed with it, they would have deferred to it because it was reasonable.<sup>28</sup> Golden Week was allowed to go forward, although in the end it turned out that only about 12,800 voters statewide used the one-stop registration and voting procedure.<sup>29</sup> In the November 2010 election, only 1,610 voters used the Golden Week procedure statewide.<sup>30</sup>

Another instructive case was *State ex rel. Myles v. Brunner*,<sup>31</sup> a mandamus action in the Supreme Court of Ohio in which a voter claimed the Secretary of State violated election laws by instructing counties not to honor certain requests for absentee ballots that were contained on a specific type of application form. The form was not one issued by the government but was created and distributed by the McCain campaign, as is permitted. The form had a legally-required statement that the person filling out the form is "a qualified elector and would like to receive an Absentee Ballot for the November 4, 2008 General Election." Next to this legally-required statement was a check box in which the voter could place a check mark to indicate the truth of the statement. However, the form did not come with instructions, and some voters inevitably failed to place a check mark in the box. In response to this situation, the Secretary of State issued a memorandum to county Boards of Election instructing them not to honor forms on which the check box was not marked because the voter had failed to affirm the legally-required statement. In the end, the Supreme Court unanimously determined that the Secretary erred and the ballots should be issued.<sup>32</sup> Although the voter did not place a check mark in the box next to the required statement, the disputed forms were signed at

the bottom, and the court reasoned that this was sufficient evidence that the voter affirmed the required statement.

Absentee voting litigation from the 2008 election in Ohio also includes *Stokes v. Brunner*,<sup>33</sup> an Ohio Supreme Court case in which a plaintiff successfully sued to overturn a Secretary of State Directive that instructed county Boards of Election that they had the option to exclude observers from in-person absentee voting.

## A CONTINUING TREND OF LITIGATION

When Jennifer Brunner became Ohio Secretary of State in 2007, many hoped that it would mean an end to the constant elections litigation seen during the tenure of her predecessor, Kenneth Blackwell. In fact, the number of lawsuits filed under Brunner's tenure was roughly two-thirds the number filed under Blackwell's tenure.<sup>34</sup> However, this strictly quantitative measure is misleading because it overlooks the fact that many of the suits filed under Blackwell's tenure remained at issue during Brunner's administration, and if they had not been filed under Blackwell's tenure, they very well might have been filed against Secretary Brunner. Thus, part of the reason why fewer lawsuits were filed under Brunner's tenure is that many potential claims were already underway. Furthermore, as suggested in the preceding section, the new conflicts that arose under Brunner's tenure were just as substantial, and threatened to disrupt the smooth functioning of elections just as much, as the conflicts that arose under Blackwell. Thus, the trend of elections litigation continued unabated under Brunner's leadership, and seems to have become a recurring feature of Ohio's political landscape.

**Pre-election litigation.** Litigation filed prior to an election can be further divided between lawsuits filed far out from the date of an election and lawsuits filed on the eve of an election. While lawsuits filed far in advance of an election can force important improvements in the election system, litigation filed on the eve of an election can often be harmful because it is too difficult for administrators to adjust their operations to obey a court order with so little advance warning. Since the completion of our original study of Midwest election administration in early 2007, Ohio has seen extensive litigation of both kinds.

Perhaps the most important suit filed far in advance of the election was *League of Women Voters v. Blackwell*,<sup>35</sup> filed in July 2005. As our original study described, this suit attacked Ohio's election on comprehensive grounds, alleging among other things that substantial numbers of voters who had properly registered failed to appear in the voter registration database, that administrators failed to mail out or mailed out too late absentee ballots to voters who had submitted proper requests, that the system failed to provide adequate notice to voters of their correct polling places, failed to provide for a fair distribution of voting machines across polling places that created a disparate pattern of long lines, failed to provide working voting machines to many precincts, failed to give poll workers sufficient training to allow them to do their jobs, failed to offer voters provisional ballots when appropriate, and failed to make polling places sufficiently accessible.<sup>36</sup>

This suit settled in June of 2009. As part of the settlement agreement, the Secretary of State agreed to do all of the following<sup>37</sup>: 1) order the issuance of paper ballots at polling places in federal elections in the event of long

lines; 2) determine whether the state could feasibly adopt a maximum wait time that voters can be expected to wait at the polls; 3) require county Boards of Election to submit written Election Administration Plans ("EAP's") to the Secretary 120 days before each federal general election (60 days before a federal primary); 4) review the EAP's to ensure that county boards are sufficiently prepared and are following proper procedures; 4) require the Boards of Elections of Ohio's most populous counties to report precinct-level data on various matters for review (other counties must provide certain data as well, including information on absentee and provisional ballots, as well as the cost of administration); 5) require county Boards to monitor and assess poll worker performance on various criteria and retrain or exclude poll workers who are not performing; 6) require county Boards to train poll workers using uniform instruction materials (although the Boards may supplement these materials with other materials not inconsistent with them); 7) expand efforts to recruit more poll workers from businesses and educational institutions; 8) collect statistics on why provisional ballots were not counted and the drop-off between the number of absentee ballots sent out to voters and the number returned; 9) send people to physically monitor Boards of Elections on a periodic basis to ensure their registration functions are being performed properly; 10) increase monitoring of disability access issues to ensure compliance; 11) require a 100% audit of all ballots cast in federal elections; 12) continue requiring touchscreen polling places to be stocked with paper ballots in case of breakdowns; 13) develop statewide standards for pre-election testing of voting machines; 14) develop statewide standards to reduce VVPAT failures; 15) establish statewide standards for securing voting equipment against electronic intrusion and unauthorized physical access.



This is an important settlement. Although Secretary Brunner had already voluntarily implemented many of these practices before the settlement, the settlement increases the likelihood that future Secretaries of State will follow these practices at least through 2015, when the settlement expires. Many of the settlement terms could go far to reduce the ideological debates over election administration, where policy decisions are discussed in an evidentiary vacuum, by increasing the amount of information available on local practices, provisional ballots, the accuracy of voting equipment, and other matters. The provisions concerning poll workers, particularly those requiring tracking and evaluation of them on an individual basis, may greatly improve the quality of the voter's experience in the polling place. The voting machine provisions could increase machine security, make security practices more uniform, and give voters increased reason for confidence in the accuracy of election results.

Nevertheless, the devil is in the details, and some knowledgeable sources we interviewed feared that the terms of the settlement might be adhered to only half-heartedly and therefore make little difference. The terms, though reasonably fleshed out over a seven-page agreement, are still sufficiently vague to allow a level of compliance that is less than ideal. The requirement that each county Board produce an Election Administration Plan, for instance, does not define what level of detail must be included in these plans, and furthermore leaves it up to the Secretary of State, not the court, to determine whether the plans constitute adequate preparation. The requirement that statistics be collected regarding provisional ballots may be helpful, but information regarding why provisional ballots are rejected

is already collected, and the settlement does not require the collection of information regarding why provisional ballots were issued in the first place—a key piece of information, the need for which has been acknowledged more than once at well-attended Ohio elections conferences. The provisions regarding the tracking, evaluation and potential suspension of poll workers who are not performing defines the criteria on which they should be evaluated, but does not set minimum levels that each poll worker must attain in these areas in order to be judged competent. In this regime, it would be easy for Boards to “go easy” on poll workers and continue using them even though their poor performance is well documented, especially in counties that are trying to cope with an ongoing shortage of poll workers. Therefore, only time will tell whether this settlement brings real change to Ohio, or whether its promise is mostly illusory.

In addition to the *League of Women Voters* lawsuit, other important pre-election litigation included a cluster of suits addressing whether and how the data contained on incoming voter registration applications should be “matched” against information contained in federal Social Security Administration and state motor vehicle databases. HAVA asks administrators to perform this kind of comparison when they receive new registration applications, and exempts the voter from certain federal voter ID requirements if the comparison shows a match. On September 26, 2008, just over a month before the November Presidential election, the Ohio Republican Party filed *Ohio Republican Party v. Brunner*,<sup>38</sup> a suit claiming that the Secretary of State was not allowing administrators to perform these matches, and asking for a preliminary injunction to require her to do so. During the course of the suit,



it was variously claimed in pleadings and in the media that the Secretary had turned off the matching function of the database, that she had not turned it off, that the state did not have the technology to perform the matches at all, and that the state did have the technology to perform the matches but did not have the technology to report the results in a way that would allow local administrators to perform meaningful follow-up. Because the litigation occurred in an expedited fashion and without discovery, the court never got to the bottom of these factual issues, and to this day they remain murky.

The U.S. District Court for the Southern District of Ohio, however, clearly believed that something was not right, as it issued a temporary restraining order compelling the Secretary to perform the matches and share the resulting data with local administrators in a way that would allow them to perform meaningful follow-up.<sup>39</sup> On appeal, an *en banc* panel of the Sixth Circuit agreed, but the entire issue was subsequently mooted when the U.S. Supreme Court determined that Ohio Republican Party, as a private litigant, was not sufficiently likely to have a private right of action to justify the issuance of a temporary restraining order.

*Ohio Republican Party v. Brunner* is important for a number of reasons. First, despite its ultimate lack of resolution, this lawsuit provides important clues to how Ohio courts see the registration matching issue. The Sixth Circuit opinion shows that the court believed HAVA requires the state to match all incoming voter registration applications, identify those applications that do not match, and report the data in a way that allows administrators to review each mismatch and even potentially make personal contact with mismatched voters

to determine whether the mismatch was an error—a conclusion that was not necessarily required by the statutory language at issue.<sup>40</sup> At the same time, the court stressed that it did not view a mismatch as fatal to a registration application, and that, without further evidence that something is amiss, a mismatched voter should be registered and permitted to cast a regular ballot just like any other voter. Nevertheless, the court clearly indicated that a mismatch might be permissibly used as a justification for an investigation by county administrators into a voter's qualifications that could ultimately result in the voter having to cast a provisional ballot that might not count.<sup>41</sup> The lawsuit, together with a number of related lawsuits, also had important implications for absentee voting, discussed in the absentee voting section above.

Other important Ohio pre-election suits included *Northeast Ohio Coalition for the Homeless* (“NEOCH”) *v. Brunner*,<sup>42</sup> a suit originally filed in October of 2006 against then-Secretary Blackwell, primarily concerning how to apply Ohio's voter ID statute and the standards used to determine the validity of provisional ballots. Most of the issues in that suit were settled by agreement between the parties upon Brunner's issuance of Directive 2008-101, which largely tracked the rules reached by the court in the same lawsuit prior to the 2006 federal election.<sup>43</sup> More novel questions concerning the treatment of provisional ballots, including the question of whether to count ballots when voters had filled out the accompanying paperwork incompletely or incorrectly, would be determined by post-election litigation.

**Post-election suits.** In close contests, post-election lawsuits are sometimes necessary to

determine the winner, and in Ohio this kind of suit is particularly likely to arise because of the state's relatively high rate of provisional voting. The plethora of 2007-2008 Ohio election litigation included one post-election suit, *State ex rel. Skaggs v. Brunner*,<sup>44</sup> that potentially could have determined the result of a congressional race in Ohio's 15<sup>th</sup> District between Steve Stivers (R) and Mary Jo Kilroy (D). The original vote count showed Stivers ahead by some 594 votes, but at that time approximately 27,000 provisional ballots remained to be counted in the district.<sup>45</sup> Of these, the action focused on 30 ballots that were lacking a signature but included a block-letter name, approximately 600 ballots that were lacking a block-letter name but included a signature, and an unknown number of ballots where both the block-letter name and signature had been included, but on the wrong form.<sup>46</sup> Two Stivers supporters filed a mandamus suit in the Ohio Supreme Court alleging that the Secretary of State had instructed the Boards of Election to determine whether to count these ballots using a standard that contradicted Ohio statutes and a previous Directive issued by the Secretary.<sup>47</sup> Specifically, the plaintiffs alleged that Secretary Brunner had previously instructed Boards that in order to have their ballots counted voters must not only write their block-letter name on the appropriate blank on the provisional ballot application, but also include their signature in another designated blank. The plaintiffs claimed that Brunner altered her position, however, after the race for the 15<sup>th</sup> Congressional District came down to a few hundred votes, by instructing boards that the block-letter name was not necessary and that, assuming it was otherwise valid, a provisional ballot that included only the voter's signature should be counted.

For her part, Secretary Brunner pointed to a portion of the relevant statute that gave instructions to be used in the event that a voter refused to fill out a provisional ballot application at all. The governing statute had a provision that seemed to suggest that there were two types of provisional ballots lacking signature, and that they should be treated differently.<sup>48</sup> It all depended on *why* the signature was lacking. In the first category of ballots, the poll worker asks the voter to fill out a provisional ballot application and the voter agrees to do so. However, the voter forgets or otherwise fails to place his or her signature in the appropriate blank on the form and thereby disqualifies the ballots from being counted. The second category of ballots is different: when the poll worker asks the voter to fill out the provisional ballot application, the voter declines. At that point, the statute instructs the poll worker to record the voter's name in the provisional ballot paperwork and permit the voter to cast a provisional ballot. Despite the fact that the voter never provides a signature, the statute nevertheless seems to suggest that the ballot is eligible to be counted. Thus, a ballot is counted when the signature is missing because the voter declined to provide a signature, but the ballot is discounted when the voter intended to provide a signature but failed to do so. Brunner argued that the 30 ballots that included a block letter name but no signature should be counted because, construing the facts and law in the voter's favor, these ballots should be assumed to fall into the second category of ballots.

The Supreme Court of Ohio sided with the plaintiffs. Although the court seemed to agree that ballots falling into the second category should be counted, it did not agree with Brunner's contention that the 30 disputed

ballots could be assumed to fall into this category. Instead, the court said, it should be assumed that the ballots fell into the first category, and that the only reason why the signatures were missing was because the voters forgot or otherwise failed to include them despite an intention to do so. This assumption should be made because of a policy whereby, in the absence of any evidence to the contrary, poll workers will be presumed to have performed their duties properly.<sup>49</sup> This policy weighed against the Secretary's presumption, because it assumed that poll workers, rather than voters, had made the error. Therefore, these 30 ballots would not count.

The court then briefly turned to the approximately 600 ballots that included signature but no block-letter name. Brunner argued that the relevant statutes compelled that these ballots be counted, but the court rejected that argument: Without reaching the question of whether Brunner's interpretation of the statute with regard to these ballots was correct, the court decided that it would not be fair to count these ballots when ballots in other counties had been counted under the stricter standard that existed prior to Brunner's articulation of these nuances.<sup>50</sup> Finally, the court decided the fate of an unknown number of provisional ballots that had both block-letter name and signature, but on the wrong form: These ballots would not count, because the relevant statute required this information be entered on the provisional ballot application, and entering it on the identification affirmation was not good enough.<sup>51</sup>

As it turned out, this case did not decide the Kilroy-Stivers race for the 15<sup>th</sup> District because the 26,000 or so provisional ballots that were not disputed in the litigation went so heavily

for Kilroy. Nevertheless, the case has a number of implications for the future of Ohio election administration. Most obviously, the court has shown that provisional voters should take great care to see that they complete all blanks on provisional ballot applications. Failure to do so risks having the ballot not count. It is notable that the court reached this result even though many if not all of the ballot applications, though imperfectly completed, seemed to have been sufficiently completed to allow the Boards of Election to make a determination that the voter was registered and eligible. Second, the court is inclined to invalidate provisional counting standards articulated after an election when they differ from the standard articulated prior to the election, even if the new standard would be reasonable standing by itself and even where it can reasonably be characterized as a clarification or expansion upon, rather than a change to, the original standard. Third, the particular aspects of the counting standard explored by this case are confusing because, like the aspects of the counting standard dealt with in prior cases, Ohio's provisional ballot statutes are what the court called "not a model of clarity." House Bill 260, supported by Secretary Brunner, would have attempted to improve upon this lack of clarity by simplifying the relevant statutory language, but it did not become law.

Finally, although the November 2010 election is outside the focus of this work, two important provisional ballot lawsuits arising out of that election are worth brief mention. In *Painter v. Brunner*,<sup>52</sup> the Ohio Supreme Court determined that provisional ballots cast in the wrong precinct could not be counted even though poll worker error was what caused them to be cast in the wrong precinct. In *Hunter v. Hamilton County Board of Elections*,<sup>53</sup> a related

case, the Sixth Circuit determined there was a likelihood of success on the plaintiffs' *Bush v. Gore*-style equal protection claim that a county board of elections violated plaintiffs' rights when it considered extrinsic evidence of poll worker error in determining whether to count certain provisional ballots, but did not consider the same level of evidence when determining whether to count other provisional ballots that were cast under similar circumstances. As of this writing, the case is ongoing.

## REFERENCES

<sup>1</sup> See STEVEN F. HUEFNER, ET AL., FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 42 (2007).

<sup>2</sup> The Secretary of State has interpreted the accompanying statement to be "insufficient" and ineligible to be counted if it lacks the voter's "name, signature, and proper ID." See Secretary of State Directive 2008-82, *Guidelines for Absentee Voting* (2008), available at <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-82.pdf>. While Boards of Election are supposed to contact voters who have submitted ballots with insufficient statements and give them an opportunity to correct them, by the time post-election litigation occurs that opportunity will have passed. Furthermore, even if the voter has provided these three pieces of information and thereby made the accompanying statement "sufficient," the Secretary has indicated that other types of omissions on absentee ballot paperwork still might result in invalidation if the omitted information was "necessary for a board of elections to properly identify the voter...."

<sup>3</sup> The only exception is if administrators are able to verify the information contained on the incoming voter registration application against information contained in federal Social Security Administration or state motor vehicle databases, in which case the voter is exempted from the federal ID requirement.

<sup>4</sup> The absentee ballot request application distributed prior to the November, 2010 election instructs voters that they must "provide one form of Identification," and lists as valid forms "The last four digits of your Social Security Number OR Your Ohio driver's license number OR Provide a copy of a current and valid photo identification, military identification, or a current (within the last 12 months) utility bill, bank statement, government check, paycheck or other government document (other than a voter registration notification mailed by a board of elections) that shows your name and current address."

<sup>5</sup> Mark Niquette, *Vote of No Confidence*, COLUMBUS DISPATCH, Dec. 15, 2007, at 1A.

<sup>6</sup> *Secretary Brunner Releases Cuyahoga County Board of Elections from Administrative Oversight*, US STATE NEWS, Nov. 25, 2008.

<sup>7</sup> Bruce Cadwallader, *Ballot Restraining Order Lifted*, COLUMBUS DISPATCH, Feb. 12, 2008, at 3B.

<sup>8</sup> Jennifer Brunner, *Primary Election: Report from the Secretary of State to the Governor, General Assembly, and the Citizens of the State of Ohio*, Mar. 4, 2008, available at <http://www.sos.state.oh.us/SOS/upload/elections/2008/pri/report/narrative.pdf>.

<sup>9</sup> *League of Women Voters of Ohio v. Blackwell*, No. 3:05-cv-7309 (N.D. Ohio July 28, 2005), available at <http://moritzlaw.osu.edu/electionlaw/litigation/lwv05.php>.

<sup>10</sup> *State ex rel. Skaggs v. Brunner*, 900 N.E.2d 982, 991 (Ohio 2008).

<sup>11</sup> H.B. 260, 128th Gen. Assemb., Reg. Sess. (Ohio 2009).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See Cuyahoga Election Review Panel, *Final Report* 5-6, 30-31, July 20, 2006.

<sup>17</sup> Joan Mazzolini, *Thousands Voted Illegally*, CLEVELAND PLAIN DEALER, Dec. 5, 2006, at A1.

<sup>18</sup> Jim Nichols, *Election Workers Plead No Contest*, CLEVELAND PLAIN DEALER, Nov. 6, 2007, at B1.

<sup>19</sup> See *ACLU v. Brunner*, No. 1:08-cv-00145 (N.D. Ohio Apr. 2, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/ACLUofOhiov.Brunner.php>.

<sup>20</sup> See *Bennett v. Brunner*, No. 07 CV 004425 (Ohio Ct. Com. Pl. Mar. 22, 2007), available at [http://moritzlaw.osu.edu/electionlaw/litigation/CuyahogaBOE\\_InRe.php](http://moritzlaw.osu.edu/electionlaw/litigation/CuyahogaBOE_InRe.php).

<sup>21</sup> Stephanie Warsmith & Rick Armon, *Counties Stock Up on Paper Ballots as Safeguard*, AKRON BEACON JOURNAL, Feb. 6, 2008, at B1.

<sup>22</sup> Joe Guillen, *Elections Board Deadlocks*, CLEVELAND PLAIN DEALER, Dec. 21, 2007, at A1.

<sup>23</sup> Laura A. Bischoff, *Smooth Election Hasn't Stopped Brunner Criticism*, DAYTON DAILY NEWS, Nov. 16, 2008, at A17.

<sup>24</sup> In 2008, 1,726,588 absentee ballots were cast out of a total of 5,775,369. See *Absentee and Provisional Ballots Statistics for November 4, 2008 General Election* (2008), available at <http://www.sos.state.oh.us/sos/upload/elections/2008/gen/>

[amendedgeneralcombined.pdf](#). In 2006, 707,856 such ballots were cast, out of a total of 4,185,597. See *Absentee and Provisional Ballot: November 7, 2006*, OHIO SECRETARY OF STATE, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2006ElectionsResults/Absentee%20and%20Provisional%20Ballot%20November%207,%202006.aspx>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See Memorandum in Opposition to Plaintiff's Renewed Motion for Temporary Restraining Order and Preliminary Injunction at 17, *Ohio Republican Party v. Brunner*, No. 2:08CV913 (S.D. Ohio Sept. 26, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ORP-Response-10-8-08.pdf>.

<sup>28</sup> *State ex rel. Colvin v. Brunner*, 896 N.E.2d 979, 990 (Ohio 2008).

<sup>29</sup> See Jennifer Brunner, *General Election: Report from the Secretary of State to the Governor, General Assembly, and the Citizens of the State of Ohio* 4, Nov. 4, 2008, available at <http://www.sos.state.oh.us/sos/upload/elections/2008/gen/Report/2008GenReportOverview.pdf>.

<sup>30</sup> Mark Niquette, *Absentee Voting Off to a Strong Start*, COLUMBUS DISPATCH, Oct. 15, 2010, at 2B.

<sup>31</sup> *State ex rel. Myles v. Brunner*, No. 2008-1842 (Ohio Sept. 17, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/mylesv.brunner.php>.

<sup>32</sup> See *id.*, slip op. (Ohio Oct. 2, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/MylesvBrunnerslipopinion.pdf>.

<sup>33</sup> *State ex rel. Stokes v. Brunner*, No. 2008-1950 (Ohio Oct. 3, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/StokesvBrunner.php>.

<sup>34</sup> *Election Law @ Moritz* tracked twenty-one major Ohio election lawsuits filed under Brunner's tenure. See <http://moritzlaw.osu.edu/electionlaw/litigation/index.php?sort=state&&active=no>. This compares with the thirty that were filed under Blackwell's term.

<sup>35</sup> *League of Women Voters of Ohio v. Blackwell*, No. 3:05-cv-7309 (N.D. Ohio July 28, 2005), available at <http://moritzlaw.osu.edu/electionlaw/litigation/lwv05.php>.

<sup>36</sup> See *id.*, Complaint, available at <http://moritzlaw.osu.edu/electionlaw/docs/ohio/LWV05/lwv-complaint5.pdf>.

<sup>37</sup> See *id.*, Order Enforcing Settlement Agreement, *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/LWVBlackwell-Order-6-19-09.pdf>.

<sup>38</sup> *Ohio Republican Party v. Brunner*, No. 2:08-cv-00913 (S.D. Ohio Sept. 26, 2008), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/ohiorepublicanpartyv.brunner.php>.

<sup>39</sup> *Ohio Republican Party v. Brunner*, 582 F.Supp.2d 957 (S.D. Ohio 2008).

<sup>40</sup> The relevant portion of HAVA gives very little detail, except to say that the chief election authority of each state “shall enter into an agreement [with departments of motor vehicles] to match [personal] information [contained in incoming voter registration applications] . . . to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.” 42 U.S.C. § 15483(a)(5)(B)(i) (Supp. V. 2007).

<sup>41</sup> *Ohio Republican Party v. Brunner*, 544 F.3d 711, 717 (6th Cir. 2008) (“At most, the relief could prompt an inquiry into the bona fides of an individual’s registration, and at most it could require an individual to cast a provisional ballot. At that point, the validity of the voter’s registration will be determined and, with it, the validity of his or her vote.”).

<sup>42</sup> *NEOCH v. Blackwell*, No. C2-06-896 (S.D. Ohio Oct. 24, 2006), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/NEOCHv.Blackwell.php>.

<sup>43</sup> See *id.*, Order, *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/NEOCH-Order-10-24-08.pdf>.

<sup>44</sup> *State ex rel. Skaggs v. Brunner*, 900 N.E.2d 982 (Ohio 2008).

<sup>45</sup> Associated Press, *Court Dumps Ballots*, GRAND RAPID PRESS (Mich.), Dec. 6, 2008 at A6.

<sup>46</sup> The court stated that these were ballots lacking block-letter name and signature on the provisional ballot application, but that had both elements on the identification affirmation, a second document filled out contemporaneously.

<sup>47</sup> Secretary of State Directive 2008-101, *Guidelines for Determining the Validity of Provisional Ballots* (2008), *available at* <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-101.pdf>

<sup>48</sup> OHIO REV. CODE ANN. § 3505.183(B)(1) (West 2011).

<sup>49</sup> *Skaggs*, 900 N.E.2d at 990.

<sup>50</sup> *Id.* at 992.

<sup>51</sup> *Id.*

<sup>52</sup> *State ex rel. Painter v. Brunner*, No. 2010-2205 (Ohio Dec. 20, 2010), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/StateofOhiovBrunner.php>.

<sup>53</sup> *Hunter v. Hamilton County Board of Elections*, No. 10-4481 (6th Cir. Nov. 21, 2010), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/Hunter.php>.



## CHAPTER THREE: WISCONSIN

THE STRENGTHS THAT WE OBSERVED in Wisconsin's election system in our previous study have mostly increased in the past couple of years. The state has always been a leader in elections, and pioneered Election Day Registration ("EDR") in 1976. Wisconsin also benefits from a favorable political culture that has historically focused on practical problem-solving rather than partisan gamesmanship, and its voters have more faith in their election system than do voters of most other states.<sup>1</sup> The state's chief election authority has always had a good relationship with local officials, which creates an atmosphere of teamwork and avoids unnecessary conflict.

Building on this foundation, Wisconsin has improved in important respects since the publication of our previous book. Its new state election authority, the Government Accountability Board ("GAB"), has proven itself to be a model of nonpartisan election administration that other states would do well to emulate. Since our 2007 study the state has restructured this office, completed its statewide voter registration database, and improved the quality of election administration in Milwaukee. Furthermore, the GAB is working on ambitious plans to reshape the election system between now and 2014.

On the other hand, Wisconsin has also been a focal point for the politically polarized debate over illegal voting and voter identification. The state has witnessed an ongoing political conflict over whether the voting system is secure, a dispute that just prior to the 2008 election boiled over in an unsuccessful lawsuit concerning the voter registration database. The Wisconsin GAB handled this dispute fairly, and the number of people documented to have voted

illegally is extremely small. Nevertheless, the state recently enacted a law requiring voters to show government-issued photo identification in order to have their votes counted. While there is little evidence that ballots cast by ineligible voters are a serious problem, there is good reason for concern that this new law will make it more difficult for eligible citizens to participate in elections in 2012 and beyond. This law is particularly worrisome given the evidence, cited in our previous study, showing that racial minorities in Wisconsin are much less likely to have the required identification.<sup>2</sup> Meanwhile, Wisconsin's process for recounts and post-election lawsuits could result in problems, in the event of a large-scale election contest like Minnesota's 2008 U.S. Senate race. These problems are likely to be exacerbated by the new ID law, given the likely possibility that more voters will be compelled to cast provisional ballots.

What Wisconsin needs, as a politically competitive battleground state, is a stable set of rules for the casting and counting of ballots that are consistent with the legitimate electoral interests of both major political parties. These rules should not become a weapon by which either party attempts to achieve an unfair electoral advantage over its opposition. While it is possible that a well-crafted voter identification law could be part of a compromise that reflects the legitimate interests of both parties, it is troublesome when it appears (as in Wisconsin at the moment) that a new voter ID law is being imposed unilaterally by one side to secure a partisan edge in upcoming elections.

This chapter begins by examining a hypothetical in which facts comparable to those of Minnesota's 2008 U.S. Senate race are



transplanted to Wisconsin. It then discusses Wisconsin's new Government Accountability Board, and concludes by addressing election administration improvements in Milwaukee.

## **HOW WOULD WISCONSIN HANDLE A HIGH-PROFILE ELECTION CONTEST?**

The recent recount and litigation in Minnesota over the U.S. Senate race between Norm Coleman and Al Franken provokes the important question of how such a close race would play out in Wisconsin. This question is of additional interest because Wisconsin and Minnesota are similar in a number of key respects. They both have Election Day registration, little or no provisional voting (thus far), and a reputation for clean, well-functioning elections systems. Both states are also known for having a public-spirited culture that is conducive to resolving elections disputes with relatively little partisan rancor. The chief election authorities of both states are well-respected and take the voting process seriously. Because Wisconsin, like Minnesota, allows officials to count absentee ballots in a central location in each jurisdiction rather than counting them in each of those jurisdictions' many polling places, the process is more easily observed by administrators and party observers and the state has better quality control and a better chance to eliminate ahead of time any potential disputes over absentee ballots.

Indeed, Wisconsin has just experienced a high-profile, carefully watched recount of a close statewide election in the case of the April 2011 special election between incumbent David Prosser and JoAnne Kloppenberg for Wisconsin Supreme Court. Because this election occurred after we had completed the field research for this book, we have not studied it in detail, although we too watched it with interest. The

unofficial returns showed Prosser with a lead of about 7,000 votes, but not until Waukesha County had corrected its election eve numbers with the addition of approximately 14,000 votes that it had initially overlooked. The recount, which had to be extended several weeks to ensure that Waukesha County could thoroughly document its recount process,<sup>3</sup> narrowed the margin by only 300 votes and did not change the result.<sup>4</sup> Despite some murmuring about anomalies in the recount, Kloppenberg ultimately did not seek to appeal these results, and so the process drew to a close much sooner than the Minnesota Senate contest of 2008. It therefore remains to speculate how other high-profile election contests with narrower margins might play out in Wisconsin if they were to reach the courts.

Despite their similarities, Wisconsin and Minnesota also differ in important ways. Wisconsin's most important advantage is that it has a truly nonpartisan, appointed chief election authority while Minnesota has an elected Secretary of State with a potential conflict of interest in the event of a very close election involving a political ally. In other ways, however, Wisconsin exhibits some "risk factors" that increase the likelihood that an election contest would lack a high degree of public acceptance. Wisconsin, unlike Minnesota, is a place where "voter fraud" has become a highly charged political issue and is frequently debated by politicians and the media. Because of this cultural trait, allegations of unlawful voting and vote suppression are likely to plague any high-profile election contest in Wisconsin, even if there is no specific reason to believe that anything unlawful has occurred. The photo ID law recently enacted by the Wisconsin legislature will likely exacerbate problems – and the possibility of litigation – in the event of a contested election. Although Wisconsin

has had very few provisional ballots thanks to its Election Day registration system, the new voter ID law can be expected to result in more, thus raising the potential for legal fights over whether those ballots should be counted. Another difference between the states is that Wisconsin allows absentee voting without an excuse, producing a much greater number of these easily disputable ballots that could drag recounts and election contests on for months.<sup>5</sup> This too may threaten finality, one of the three fundamental values we believe are of greatest importance in maintaining a healthy elections system. Wisconsin's decentralized election system creates an additional complication. With approximately 1,850 autonomous municipal-based elections jurisdictions, compared with Minnesota's 87 counties, the level of central control that can be exerted on the recount process to increase uniformity inevitably decreases.

***Controversy over unlawful voting and new voter ID rules.*** One of the most remarkable aspects of the 2008 Minnesota race is that, despite the razor-thin margin of victory, no candidate suggested at any point that any fraud had occurred. In contrast, despite the absence of any razor-thin margin like that seen in Minnesota, Wisconsin seems to have taken up the concept of “voter fraud” as a political football. In 2006, there were allegations that the Bush administration was pressuring then-Wisconsin U.S. Attorney Steve Biskupic to prioritize investigation and prosecution of illegal voting, and that he was “targeted” when he refused.<sup>6</sup> Later, Wisconsin's elected attorney general, J.B. Van Hollen, faced accusations that he used the issue for political gain. Democrats accused him of bringing a 2008 lawsuit against the GAB for political purposes,<sup>7</sup> and Van Hollen initially denied, though later admitted, that prior to filing the suit he had communicated

“several times” with Republican leaders, and even alluded to the forthcoming suit in a speech he gave at the Republican National Convention.<sup>8</sup> Although Van Hollen's suit quickly failed, Republicans have continued to press the issue of fraud and voter registration database integrity, including calling for the Milwaukee Elections Commission—the primary local election authority—to remove the registrations of some 6,292 voters whose information they claim cannot be verified by checks against other databases.<sup>9</sup>

Most recently, this focus on fraud was used to justify enactment of a new voter ID law in May 2011. Because the ID law will not take effect until Spring 2012, we have not yet had the opportunity to see how it will work in practice. However, as written its strictures displace Ohio's voter ID statute as the most stringent ID law in our five-state study. Under the statute, voters must present a photo ID in the form of a driver's license, state-issued photo ID, military ID, U.S. passport, certificate of naturalization, Wisconsin college ID that meets certain requirements, tribal ID, or temporary ID card for those who have recently moved from out of state.<sup>10</sup> In contrast, Ohio's ID law (as of this writing) allows utility bills, bank statements, government checks, and other informal types of ID. Wisconsin's new ID law also is stricter in that it applies not only to in-person voters but also to absentee voters, who must mail in a photocopy of their required ID. In Ohio, absentee voters who are willing and able to provide their driver's license or social security number are exempt from the ID requirement. Wisconsin's new law also gives voters who must cast provisional ballots only until the Friday after the election to produce the ID they lacked at the polls, compared to Ohio's relatively generous ten-day period. Wisconsin voting rights groups are already making plans

to fight the voter ID law in court, so litigation can be expected in this area. Litigation can also be expected as 2012 approaches and the system has to confront the intricacies of how the voter ID law meshes with other parts of the elections system, and particularly provisional balloting, an area in which Wisconsin has little previous experience. This would inevitably complicate the resolution of a contest over a close election.

Claims of unlawful voting could also be expected in a Wisconsin election contest. As in most states, if unlawful ballots were to make it into the election-night count, a candidate seeking to reverse the result would have to prove the number and content of the unlawful votes and show that the unlawful votes changed the result of the election (the “outcome test”).<sup>11</sup> Typically this is nearly impossible because the ballots have already been mixed in with lawfully cast ballots and can no longer be identified and segregated to determine their content. Wisconsin courts do permit a challenger to put those who have cast unlawful ballots on the stand to testify about the content of their ballots,<sup>12</sup> but that testimony is inherently suspect because the voter now knows the impact of their testimony. Furthermore, the unlawful voter may be able to avoid testifying by invoking the Fifth Amendment right against self-incrimination.<sup>13</sup> For these reasons, it would be unusual for a court to determine that a candidate has satisfied the “outcome test” without the kind of speculation that courts generally try to avoid. It is much easier for the court to decide merely that the contestant has failed to meet the burden of proof, and therefore that the original result should stand.

Another option, but one rarely used, would be for the court to throw out the original result and order a new election. The Wisconsin Supreme Court did use this option to

invalidate the result of a small-town election in 1976 in which some voters were required to register prior to voting while others were not.<sup>14</sup> The court concluded that the election was fundamentally unfair because “it is not clear that the correct standards for voting were applied with uniformity.”<sup>15</sup> However, from a public image standpoint, the court has little to gain by invalidating an important election, which requires an affirmative decision that the result is unclear and therefore opens up the court to charges of bias from the contestee’s camp. Furthermore, special elections may suffer from complications that can make them even more unfair than the original election.<sup>16</sup> It is much safer to make the more “passive” decision to leave the result undisturbed.

Accordingly, the key to dealing with the commingled ballots problem is to prevent unlawful ballots from making it into the count in the first place. Wisconsin officials know this, and have taken action to reduce the potential for illegal voting. The primary target of their efforts is unlawful balloting by disenfranchised felons, which, together with instances of double-voting, seem to make up most of the few allegations of unlawful voting in the state. In the past, part of the problem was that some disenfranchised felons did not realize they were ineligible to vote. But a new state law requires that judges sentencing convicted felons to prison must orally instruct them that they can no longer vote, and also make them sign a statement to that effect.<sup>17</sup> Furthermore, after each election, the state uses its improved statewide voter registration database to identify possible instances of felon and double-voting. After the 2008 election, the database identified approximately 195 cases of *potential* unlawful felon voting—out of 2,996,869 votes cast statewide—and referred them to local authorities.<sup>18</sup> But these referrals

generated only a handful of prosecutions, and apparently only one that resulted in a felony conviction.<sup>19</sup> These low numbers indicate that unlawful felon voting is rare in Wisconsin.

The standards of a criminal prosecution for election fraud are, of course, different from the question of whether the outcome of an election was tainted by ineligible ballots. But even assuming that all 195 suspected instances of unlawful voting by felons turned out to generate invalid ballots, that number is extremely low in the context of a statewide election of almost 3 million ballots cast. To put it in context, consider a recent report that FairVote has issued on all statewide recounts between 2000 and 2010.<sup>20</sup> That report showed that of the 2,884 statewide elections in the U.S. during that decade, only four races had a margin of victory of less than 200 votes, as shown in Table Five below.

Not even the 2008 U.S. Senate election in Minnesota produced a margin below 200, although it came close (225), and had the smallest margin in percentage terms (0.009%). Moreover, it must be remembered that 200 invalid ballots, because they will not all be cast for the same candidate, cannot affect the outcome of an election with a 200-vote margin of victory. Even if the 200 ballots favored one candidate 75%-25%, or 150-50—an extraordinarily lopsided result—the margin of victory would need to be 100, not 200, for the

election to be undermined by these ineligible ballots. Therefore, although it is prudent for states to remain watchful for signs of unusually large numbers of ineligible ballots—no state wants to be in the position that Washington was in 2004, where it had some 1,678 invalid ballots dwarfing its 127-vote gubernatorial margin of victory—the evidence from Wisconsin indicates that it remains far from that unfortunate situation.

Moreover, the legislature has examined the possibility of making it legal for paroled felons to vote, which would eliminate this particular type of ineligible ballot altogether.<sup>21</sup> Although the proposal was rejected, it may reappear in the next legislative session. The recently enacted photo identification law would do nothing about felons illegally voting, as the possession of ID tells nothing about whether one is an ineligible felon. There is no evidence of any serious problem with voter impersonation fraud, the only form of illegal voting that a strict ID law could hope to address. In fact, out of the twenty individuals prosecuted for crimes arising out of the November 2008 election, none of them were accused of impersonating another voter.<sup>22</sup>

If Minnesota is instructive, another area where allegations of ineligible ballots could be expected is absentee balloting. Absentee ballots, compared to ballots cast on Election Day, are “low-hanging fruit” in an election

**TABLE FIVE: NARROWEST VICTORY MARGINS IN U.S. ELECTIONS, 2000-2010**

State	Year	Office	Margin	Total Votes
Colorado	2000	State Ed. Board	90	1,535,032
Montana	2000	Super. Public Instruction	61	63,207
Vermont	2006	Auditor	102	223,438
Washington	2004	Governor	129	2,746,593

contest because they leave a paper trail that contestants can use to establish they were not eligible to be counted. In Wisconsin, this is even more of a concern, because, going by 2008 figures, Wisconsin casts 2.25 times more absentee ballots than Minnesota,<sup>23</sup> a low-absentee state. Fortunately, Wisconsin is ahead of Minnesota on this point, and passed a law in 2005 that allows administrators to move absentee ballot-counting operations to a central facility where they can be easily observed by administrators and party representatives to ensure the rules are applied properly. Furthermore, like Minnesota,<sup>24</sup> Wisconsin has ample precedent that impairs candidates' ability to challenge absentee ballots that have made it into the count. Although W.S.A. 6.84-6.89 contain various requirements the voter must fulfill, including submitting a proper absentee ballot request and signing a certification, Wisconsin courts have historically construed many of these requirements as "directory," at least where there is no suggestion of fraud.<sup>25</sup> In other words, state law anticipates the problem of candidates alleging that flawed absentees have made it into the count, but looks more to substance than form and will not invalidate ballots cast by innocent, eligible voters just because those voters made some technical mistakes in filling out the paperwork. Thus, in the absence of fraud, contestants are almost entirely deprived of any opportunity to make an issue out of already counted absentee ballots.

***Unique process for resolving election contests.*** If a high profile election contest occurred in Wisconsin, the fact that the state has an atypical set of post-election procedures would inevitably give rise to the question of whether these procedures are sound. In most states, a losing candidate first asks local election officials for a recount, which results in a revised vote total but no written factual or

legal conclusions. The losing candidate then may file an election contest, which typically is handled like any other lawsuit and concludes with a trial and formal findings of fact and law.

In contrast, when a Wisconsin election enters the judicial contest phase, the circuit court must be highly deferential to the factual and legal conclusions of the recount authority,<sup>26</sup> which is typically the county board of canvassers—the county clerk and two voters appointed by the clerk, one from each party. The recount authority acts as an administrative tribunal, and can subpoena records and take testimony. On appeal, the circuit court then will generally exclude evidence and argument not presented to the recount authority.<sup>27</sup> In function, therefore, Wisconsin recount authorities, rather than trial courts, hear election contests. Thus, the recount authority has more power and greater responsibility than recount authorities in most states, whose responsibilities are usually limited to overseeing the physical recounting of ballots. In fact, the recount authority arguably has more practical political power than the courts because court review is limited in scope and deferential to the factual findings of the recount authority.

This arrangement may serve certain efficiency and finality purposes, but it also raises three concerns. First, the recount authority is being asked to perform two different and potentially incompatible roles. In its first role, it conducts the election and any recount, but in the second role it is expected to take a step back and evaluate its own work in determining whether the result of the election was accurate. As part of that evaluation, the recount authority may be asked to decide whether the authority itself or those working under its supervision made critical errors that could have changed the result of an election. No matter how fair

recount officials may try to be, they also may become defensive if they feel that their job performance is under attack.

A second concern is training. There is no requirement that county boards of canvassers possess any legal knowledge or training that would enable them to conduct fair and orderly quasi-legal proceedings. Furthermore, the clerk and the other two members of the board of county canvassers will often have strong party ties that could present a conflict of interest or lead to accusations of partisanship.

A third concern is that the division of labor between the recount authority and the court system is not as clear as it seems. Although state statutes essentially imply that the recount authorities function as the trial courts for election contests, in practice the issue of which government entity has jurisdiction may get blurred. For instance, if during a recount a candidate felt that recount officials were not following the rules, the candidate might pursue a separate mandamus lawsuit in the local court to try to control the recount proceedings. In the case of a statewide recount with county officials across the state involved, it would be possible to file constitutional claims arguing that recount officials were not applying the rules uniformly. Then recount officials and the courts might get into a jurisdictional dispute over who was responsible for ensuring that the recount proceeded properly, leading to confusion and inefficiency. It would not be surprising, for instance, if local recount authorities counted questionable ballots and inseparably mixed them in with other ballots only to have a court later say that the standards used were invalid and that the result of the recount was irrevocably tainted. This blurring of the lines between recount and quasi-judicial functions was one of the difficulties that marred

Minnesota's generally pristine election (see our critique of the Minnesota contest in Chapter One).

## **GOVERNMENT ACCOUNTABILITY BOARD**

In our earlier book, we noted that Wisconsin's statewide election authority, the State Elections Board, was being eliminated and replaced by a new entity, the Government Accountability Board, which would have jurisdiction over both election administration and government ethics. Where the old board consisted of eight members each appointed by various designated leaders in state government, the new board consists of six retired state court judges appointed by the governor and confirmed by two thirds of the state legislature. The staff of the new board is divided between two sections, the Ethics and Accountability Division and the Elections Division. The main motive for the reform was not to improve the administration of elections, but to tighten enforcement of campaign finance and ethics rules. Nevertheless, at the time of the change we predicted that the new structure would have some impact on the administration of elections, although it was too early to tell what that impact would be.

After extensive interviews with election administrators, knowledgeable observers, and the Director of the GAB itself, we believe that the new structure is an improvement upon the old State Elections Board, which itself already had a strong reputation for nonpartisanship, professionalism, and effectiveness. In fact, this body achieves something that up until now has been a rarity in the United States: election administration that is independent of partisan politics. The main advantage of the new structure is its additional insulation from the partisanship that can creep into election administration and lead to policies designed or



perceived to favor one candidate or party over another. The new system requires two-thirds legislative confirmation of all appointees,<sup>28</sup> which should have a moderating influence on political makeup of the board, as either political party can reject nominees it finds particularly odious. The other insulating factor not present under the old system is the requirement that all GAB members be retired judges.<sup>29</sup> This obviously gives the GAB an advantage in understanding the kinds of legal questions that frequently arise in conducting elections, but it also means that the board is populated with individuals who have already finished long and successful careers and therefore can presumably afford to champion sound policy decisions even when those decisions might offend powerful political players.

This likelihood of GAB members making decisions regardless of partisan considerations is increased by Wisconsin's reputation for having a relatively non-partisan judiciary. The non-partisanship of the new GAB is not just theoretical, but is confirmed by interviews with state administrators and representatives of non-profit organizations who glowed when describing the fairness and professionalism of the GAB members and staff.

Indeed, the GAB proved its capacity for standing up to political coercion when in September of 2008 it was pressured and eventually sued by the state Republican Party and the state attorney general over its observation of federal laws governing statewide voter registration database procedures. As discussed above, the complaint alleged that the GAB and other state actors, prior to August 6, 2008, failed to use a database matching procedure to verify the information contained on incoming voter registration applications in violation of the Help America Vote Act.<sup>30</sup> The verification had

not occurred prior to the August 6 date because the technology was not yet in place to make it possible. The plaintiffs wanted administrators to go back and verify those registrations, and also suggested that non-matching voters, at least under some circumstances, might need to be flagged and required to provide identification at the polls.<sup>31</sup>

These arguments lacked merit. The primary argument in the matching litigation—that HAVA requires officials to match information contained on incoming voter registration applications against Social Security and motor vehicle databases—is partially true<sup>32</sup> (see this chapter's discussion of the Wisconsin GAB, below, for a detailed explanation of the dispute over matching). However, there is no legal basis for going further and requesting that voter registrations be cancelled or provisional ballots cast just because the information on the registration application does not match. After all, there are several innocent explanations for a non-match—that the information in the SSA or MV database is incorrect or out of date (as in the example of a name-change), that the matching protocol is too sensitive and results in a non-match even when any reasonable person, looking at the same data, would say it was close enough, etc.—and Wisconsin law has long prohibited removing the registrations of individuals unless the evidence shows beyond a reasonable doubt that they are ineligible.<sup>33</sup> Under these circumstances, it is unreasonable, and even illegal, to remove the voter without at least some further evidence that there is something amiss. Thus, the Eleventh Circuit,<sup>34</sup> the District Court for the Western District of Washington,<sup>35</sup> and the state court in the *Van Hollen* suit<sup>36</sup> all concluded it is illegal to precondition registration on a valid match, though in the *Van Hollen* suit this was ancillary to the court's holding.<sup>37</sup>



During the lawsuit the GAB stood its ground and did so without hint of any internal friction, a stance that was eventually vindicated when the trial court ruled that there was no basis for forcing voters to present additional identification or conform to any other additional requirements simply because their registrations had not been verified.<sup>38</sup> It is not clear that the previous incarnation of the state's chief election authority would have been able to remain unified in its position when subjected to this kind of pressure, and it is doubtful that state election boards of some other states, such as Illinois, could have done so.

Aside from adhering to Wisconsin's tradition of nonpartisanship in election administration, the GAB has also shown itself to be conscientious in constantly reexamining itself as well as election procedures in the state to find areas for improvement. For instance, after the 2008 election the GAB surveyed all election administrators in the state to solicit opinions about how it could do a better job. The League of Women Voters of Wisconsin also reports that the GAB has been good about seeking input from non-profit organizations and everyday citizens. In 2009, the GAB toured the state to discuss with citizens and clerks various proposals for bringing "true" early voting to Wisconsin, in contrast to the current system of in-person absentee voting (the GAB ultimately recommended against adopting true early voting at this time<sup>39</sup>). After competing for a \$2M grant from the United States Elections Assistance Commission, the GAB also recently completed development of a comprehensive electronic elections data collection system that will provide much-needed statistics and other information to help administrators develop better elections policies. All the while, the GAB has continued to provide strong guidance to local administrators in the form of seminars

and its regularly updated, comprehensive elections manuals, including manuals detailing Election Day<sup>40</sup> and recount procedures.<sup>41</sup>

In fact, it is clear that the GAB is providing a level of guidance and leadership that is not possible in many other states, where the chief election authority has not developed sufficient credibility among administrators to be both trusted and taken seriously. A good example is the five-year plan the GAB has developed together with administrators and others in the policy community to ensure that Wisconsin continues to be a leader in election administration.<sup>42</sup> Proposals outlined in the plan include reducing the amount of paperwork involved in absentee balloting, allowing return of completed absentee ballots by fax and email, allowing voters to submit a single absentee ballot request that is effective indefinitely and eliminates the need for subsequent requests, allowing voters to check the status of their absentee and provisional ballots online, mitigating shortages of poll workers by allowing them to serve in municipalities other than those in which they live, putting electronic pollbooks in polling places to increase throughput and help prevent double-voting, developing an electronic device in the polling place to help poll workers with procedural questions, developing online voter registration, requiring every jurisdiction in the state to use the same brand of voting machines, upgrading current online training materials for poll workers and election administrators to include more video and even real-time interaction over the web, moving primary dates earlier to allow more time for auditing and recounts, instituting a pilot early voting program, and other proposals.

The GAB and Wisconsin will deserve great accolades if they manage to accomplish even half of the goals outlined in this plan, and

Wisconsin would become a true pioneer of 21<sup>st</sup> Century voting. It also speaks volumes as to how well-respected the GAB is in Wisconsin that it was able to obtain funding for such an ambitious plan in a time of financial crisis, when many states are not even willing to maintain previous levels of funding for many basic services.

## MILWAUKEE

Our previous book included an in-depth discussion of administrative problems in Milwaukee, most of them occurring in the November 2004 general election. Many of the problems concerned security issues and allegations of fraud, which ultimately led to the conviction of seven individuals for voting while ineligible due to felony conviction.<sup>43</sup> But the most troubling problems stemmed from poor management. For instance, on the day before the election the Executive Director of the Milwaukee Election Commission learned that her office had failed to enter approximately 20,000 registration cards into the registration lists, prompting a last-minute scramble to process that information and update pollbooks.<sup>44</sup> Two-hundred thirty-eight absentee ballots were not timely delivered to the polls for counting and for that reason had to be counted late, after the Commission had received special permission to do so from the state. An unknown number of people who had requested absentee ballots never received them at all. About 5,000 more ballots were cast on Election Day than the number of people who signed in at the polls.<sup>45</sup> A number of Election Day registrations were never entered into the statewide voter registration database because they lacked information determined to be essential for a valid registration, yet a number of other Election Day registrations *were* entered

into the database despite omissions that were similar or even identical. These problems and many others are detailed in a 2005 report<sup>46</sup> by a special task force appointed to investigate these matters.

However, two federal elections have passed since 2004, with few documented problems.<sup>47</sup> Much of the credit goes to administrators who acknowledged their mistakes and worked hard to see that they would not occur again in the future. For instance, to help prevent individuals from using EDR to vote without completely filling out their registration applications and showing proper identification, Milwaukee doubled the amount of training required for poll workers, made class sizes smaller, required additional training for lead poll workers, developed teams of quality control inspectors who go from poll to poll on Election Day, and developed a grading system for poll workers that can lead to them being suspended for poor performance.

To address past problems with absentee voting, a law passed in 2005 has allowed Milwaukee to take the absentee counting process out of the polling place, where it used to occur at the conclusion of election night, and move it to a centralized location.<sup>48</sup> This not only eliminates the problem of getting the ballots securely to the polls, but also has given administrators a much greater degree of control over the counting process to make it fairer and more uniform. Finally, it allows poll workers to concentrate on their primary job—counting traditional in-person ballots—and to finish earlier, so they can go home.

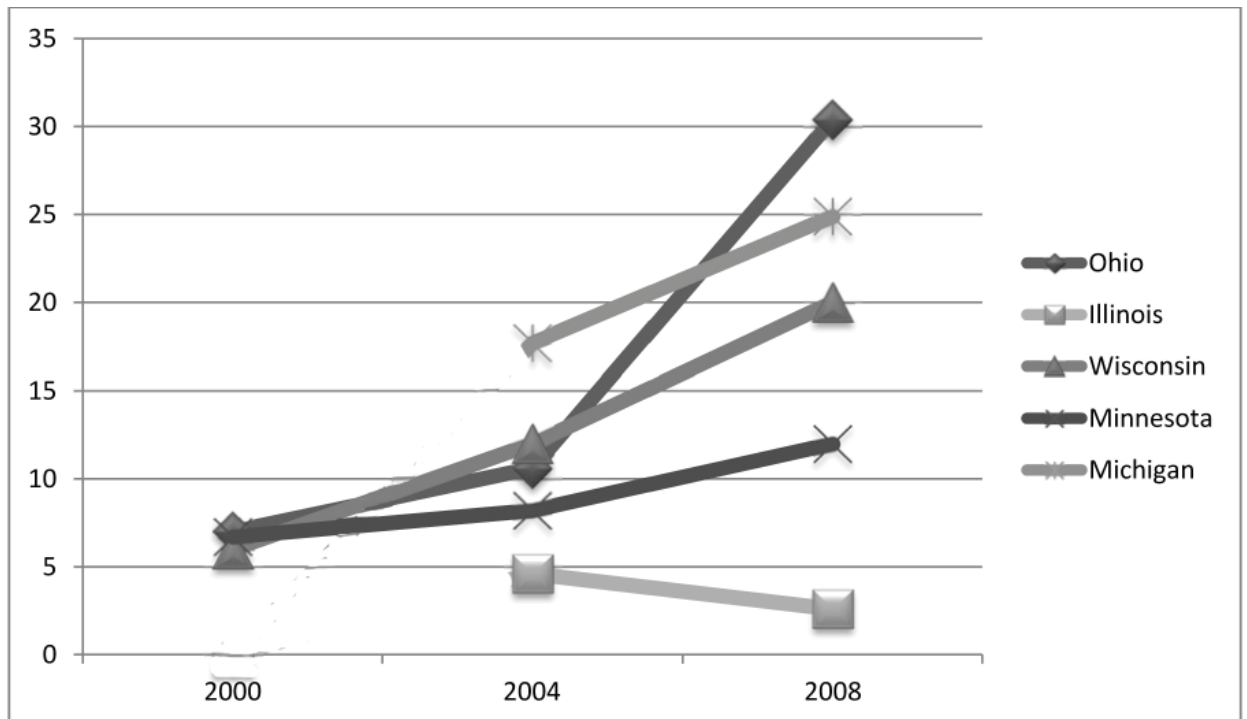
Furthermore, prior to the 2006 election, officials checked the registration database against U.S. Postal Service address records,

developed a list of 2,900 addresses that did not match, and placed a notation in poll books to remind poll workers to question these voters regarding their true addresses. Another check occurred in late 2008 and showed that the number of invalid addresses had been cut to 50% of the number that existed in 2004.<sup>49</sup> Finally, as part of a 2009 statewide effort to clean voter rolls, Milwaukee purged a large number of dead or otherwise ineligible voters.<sup>50</sup> (This is a federally-mandated purge of voters who have not voted in two consecutive elections, and not the kind of mismatch purge that would be based on an inability to verify voter registration data against Social Security Administration and motor vehicle databases.)

Milwaukee has also shown its willingness not only to prevent problems before they occur,

but also to improve systems for dealing with problems that are not prevented. Prosecutorial authorities have an excellent record of aggressively investigating and prosecuting voting fraud, in the few instances where it does exist. Just before the 2008 election, Milwaukee County’s Democratic district attorney and Wisconsin’s Republican attorney general created a joint bipartisan task force of law enforcement officials to identify and investigate any reports of fraud.<sup>51</sup> The former director of the Milwaukee Election Commission who presided over the irregularities in 2004 resigned shortly thereafter and was replaced by Sue Edman, a twenty-eight-year police veteran with extensive experience in managing criminal investigations.<sup>52</sup> Both the attorney general and the district attorney of Milwaukee have praised her for her “aggressive response to

**TABLE SIX: ABSENTEE BALLOTS AS A PERCENTAGE OF BALLOTS CAST ACROSS THE FIVE STATES**



[election] fraud allegations.”<sup>53</sup> The Commission also improved its record-keeping practices, and law enforcement authorities with whom we spoke reported that this has greatly facilitated investigations of possible ineligible and double voting, investigations that previously were thwarted by poor records. For these reasons, Milwaukee elections today are much better managed and more secure than they were in 2004.

## REFERENCES

<sup>1</sup> State of Wisconsin Government Accountability Board, *Report to Accountability Board: Poll Shows Wisconsin's Voters More Satisfied Than Neighbor States* (2009), available at <http://elections.state.wi.us/docview.asp?docid=16566&locid=47>.

<sup>2</sup> See STEVEN F. HUEFNER, ET AL, FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 122 (2007).

<sup>3</sup> See Ed Treleven, *Judge Extends Court Recount: All Counties Except Waukesha Finished Monday*, WISCONSIN STATE JOURNAL, May 10, 2011, at A3.

<sup>4</sup> Wisconsin Government Accountability Board, *Canvass Results for 2011 Spring Election*, available at [http://gab.wi.gov/sites/default/files/Percent%20results\\_after%20Supreme%20Court%20Recount.pdf](http://gab.wi.gov/sites/default/files/Percent%20results_after%20Supreme%20Court%20Recount.pdf).

<sup>5</sup> In 2008, 20% of Wisconsin voters used either an in-person or mail-in absentee ballot to vote early, as opposed to only 12% of Minnesota voters. Editorial, *Don't Underestimate Wisconsin's Appetite for Early Voting*, LA CROSSE TRIB. (Wis.), Aug. 12, 2009, available at Westlaw, 2009 WLNR 15602339; Richard Chin and John Brewer, *Lines Deter Few on Day of High Voter Turnout*, ST. PAUL PIONEER PRESS, Nov. 5, 2008, at A2.

<sup>6</sup> Dan Eggen & Amy Goldstein, *Voter Fraud Complaints by GOP Drove Dismissals*, WASH. POST, May 14, 2007, at A7.

<sup>7</sup> *Van Hollen v. Government Accountability Board*, No. 2008CV002804 (Wis. Ct. App. Sept. 10, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/vanhollenv.gab.php>.

<sup>8</sup> Steve Elbow, *Van Hollen Hinted at Voter Lawsuit at GOP Convention*, CAPITAL TIMES (Wis.), Oct. 6, 2008, at News, available at Westlaw, 2008 WLNR 19119350.

<sup>9</sup> Jason Stein & Patrick Marley, *Elections Overhaul Proposed by State Senate Committee*, MILWAUKEE JOURNAL SENTINEL, Apr. 2, 2010, available at Westlaw, 2010 WLNR 6862114.

<sup>10</sup> See WIS. STAT. ANN. § 5.02, outlined in 2011-2012 Wisc. Legis. Serv. Act 23 (2011 A.B. 7) (WEST).

<sup>11</sup> In election contests, Wisconsin courts apply the “outcome test”: the contestant must “prove that the will of the electors would have favored the opposite result actually reached.” *McNally v. Tollander*, 302 N.W.2d 440, 447 (Wis. 1981); see also *Carlson v. Oconto County Bd. of Canvassers*, 623 N.W.2d 195, 198 (Wis. Ct. App. 2000) (“[O]ur supreme court has approved the outcome test for most election irregularities.”).

Therefore, in an election contest based on absentee ballot fraud, the contestant would first carry the burden of proving that fraud actually occurred. Before a ballot can be excluded based on the allegation of fraud, “some evidence... [must be] adduced to support an inference of its invalidity. Fraud should not be presumed.”); *Ollmann v. Kowalewski*, 300 N.W. 183, 186 (Wis. 1941). Second, after the fraud is proven, to “win” the contestant would have to show it was extensive enough to change the result of the election. *State ex rel. Swenson v. Norton*, 1 N.W. 22, 31 (Wis. 1879).

<sup>12</sup> While the Wisconsin constitution generally protects voting secrecy, it expressly states that it does not protect the secrecy of individuals who cast ballots illegally. See Wis. Const. art. II, § 3; *Carlson v. Oconto County Bd. of Canvassers*, 623 N.W.2d 195, 199 (Wis. Ct. App. 2000). Subject to the right against self-incrimination, those individuals may be compelled to testify about the content of their ballots

<sup>13</sup> See *id.* However, subject to the right against self-incrimination, those individuals may be compelled to testify about the content of their ballots. See 7 WIS. PRAC., WIS. EVIDENCE § 507.1 (3d ed.).

<sup>14</sup> *Town of Washington v. City of Altoona*, 243 N.W.2d 404 (Wis., 1976).

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g., Steven Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265 (2007).

<sup>17</sup> WIS. STAT. ANN. § 973.176(2) (West 2011).

<sup>18</sup> Ryan J. Foley, *195 Felons May Have Cast Ballots*, WISCONSIN STATE JOURNAL, Oct. 1, 2009, at A5.

<sup>19</sup> Bruce Vielmetti, *7 Charged with Voter Fraud in 2008 Elections*, MILWAUKEE JOURNAL SENTINEL, Apr. 22, 2010, available at Westlaw, 2010 WLNR 8270317; Chris Rickert, *How Common is Voter Fraud in Wisconsin?*, WISCONSIN STATE JOURNAL, Apr. 28, 2010, at A2.

<sup>20</sup> <http://www.fairvote.org/recounts>.

<sup>21</sup> Steven Elbow, *Democrats Want to Reduce State’s Blooming Prison Population*, CAPITAL TIMES (Wis.), Dec. 3, 2009, available at Westlaw, 2009 WLNR 24478639.

<sup>22</sup> Patrick Marley, *Vote on Bill Expected in May*, MILWAUKEE JOURNAL SENTINEL, Apr. 28, 2011, at B1.

<sup>23</sup> In 2008, Wisconsin cast 633,600 civilian absentee ballots, while Minnesota only cast 281,291. See United States Election Assistance Commission, *2008 Election Administration and*

*Voting Survey 24-25*, available at <http://www.eac.gov/assets/1/ Documents/2008%20Election%20Administration%20and%20 Voting%20Survey%20EAVS%20Report.pdf>.

<sup>24</sup> In Minnesota, the rule is that candidates generally must object to absentee ballots at the time of counting, or not at all.

<sup>25</sup> See *Schmidt v. City of West Bend Bd. of Canvassers*, 118 N.W.2d 154 (Wis. 1962) (requirement of having notary witness signature of ballot construed as directory); *Petition of Anderson*, 107 N.W.2d 496 (timing of submission of absentee ballot request held directory); *Sommerfield v. Board of Canvassers of City of St. Francis*, 69 N.W.2d 235 (Wis. 1955) (personal delivery requirement held directory); *Lanser v. Koconis*, 214 N.W.2d 425 (Wis. 1974) (delivery requirement held directory); *Soderbloom v. Manske*, 321 N.W.2d 637 (Wis. Ct. App. 1982) (various absentee procedures held directory).

<sup>26</sup> WIS. STAT. ANN. § 9.01(8); *Roth v. Lafarge School Dist. Bd. of Canvassers*, 677 N.W.2d 599, 602 (Wis. 2004).

<sup>27</sup> WIS. STAT. ANN. § 9.01.

<sup>28</sup> WIS. STAT. ANN. § 15.07 (West 2011).

<sup>29</sup> WIS. STAT. ANN. § 15.60 (West 2011).

<sup>30</sup> See *Petition for Writ of Mandamus, Van Hollen v. Government Accountability Board*, No. 2008SCV004085 (Wis. Cir. Ct. Sept. 10, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/VanHollen-Complaint.pdf> (last viewed November 10, 2010).

<sup>31</sup> See Trial Court Order, *id.*, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/VanHollen-Order-10-23-08.pdf> (last viewed April 12, 2010).

<sup>32</sup> But see Nathan Cemenska, *HAVA’s Matching/ID Requirement: A Meaningless Tale Told By Congress*, 12 RICH. J.L. & PUB. INT. 27 (2008).

<sup>33</sup> WIS. STAT. ANN. § 6.325 (West 2011); *Logerquist v. Board of Canvassers for Town of Nasewaupsee*, 442 N.W.2d 551, 554 (Wis. Ct. App. 1989).

<sup>34</sup> *Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1174 n. 21 (11th Cir. 2008) (“HAVA... does not require that states authenticate these numbers by matching them against existing databases. It is explicit that states are to make determinations of validity in accordance with state law. States are therefore free to accept the numbers provided on [the] application form, which at least in Florida are completed with an oath or affirmation under penalty of perjury, as self-authenticating.”).

<sup>35</sup> *Washington Ass’n of Churches v. Reed*, 492 F.Supp.2d 1264, 1268 (W.D. Wash. 2006) (“It is clear from the language of the statute and by looking at legislative history that HAVA’s matching requirement was intended as an administrative safeguard for ‘storing and managing the official list of registered voters,’ and not as a restriction on voter eligibility.”).

<sup>36</sup> See Order and Hearing Transcript 10, *Van Hollen v. Government Accountability Board*, No. 2008CV004085 (Wis. Cir. Ct. Sept. 10, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/VanHollen-Order-10-23-08.pdf> (“Notably, though, there is no requirement in Wisconsin law that there be a driver’s license or a Social Security number for registration. There is no state law requirement that data in a voter list must match data kept by any other agency as a precondition to voting.... With respect to maintenance of this [voter registration] list, HAVA is explicit that removal of names occurs only in accordance with state law....”).

<sup>37</sup> Van Hollen and the Republicans in their suit had initially asked for the voter registrations to be removed, but later revised their requested relief by asking only that the matches be performed and, in the case of the Republicans only, that unmatched voters be asked for identification at the polls. See *id.* at 5.

<sup>38</sup> “Nothing in state or federal law,” the court said, “requires that there be a data match as a condition on the right to vote.” Trial Court Order, *id.*, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/VanHollen-Order-10-23-08.pdf> (last viewed April 12, 2010).

<sup>39</sup> Jessica VanEgeren, *Wisconsin Voters Won’t See Early Voting Any Time Soon, If State Elections Officials Get Their Way*, CAPITAL TIMES, December 30, 2009, at 6.

<sup>40</sup> State of Wisconsin Government Accountability Board, *Election Day Manual for Wisconsin Election Officials* (2008), available at <http://elections.state.wi.us/docview.asp?docid=12848&locid=47>.

<sup>41</sup> *Id.*

<sup>42</sup> State of Wisconsin Government Accountability Board, *Wisconsin’s 2009-2014 Election Administration Plan*, [http://gab.wi.gov/sites/default/files/publication/65/2009\\_2014\\_wisconsin\\_election\\_administration\\_plan\\_\\_16316.pdf](http://gab.wi.gov/sites/default/files/publication/65/2009_2014_wisconsin_election_administration_plan__16316.pdf)

<sup>43</sup> *The Truth About Fraud: Wisconsin, 2004*, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, available at [http://www.truthaboutfraud.org/case\\_studies\\_by\\_state/Wisconsin\\_2004.html](http://www.truthaboutfraud.org/case_studies_by_state/Wisconsin_2004.html).

<sup>44</sup> Greg J. Borowski, *Artison Resigns as Elections Director*, MILWAUKEE JOURNAL SENTINAL, Mar. 2, 2005, at A1.

<sup>45</sup> *Id.*; John Fund, *Wisconsin and the Voter Fraud Agenda*, WALL ST. J., Apr. 24, 2010, at A13.

<sup>46</sup> City of Milwaukee Election Task Force, *Official Report* (2005), available at <http://www.legis.state.wi.us/lc/committees/study/2004/ELAW/files/milwreport.pdf>.

<sup>47</sup> For a comprehensive overview of problems occurring in the 2006 election, see Nathan Cemenska, *Overview of Wisconsin Voting Process in November, 2006*, ELECTION LAW @ MORITZ (Dec. 15, 2006), <http://moritzlaw.osu.edu/electionlaw/election06/WisconsinElectionOverviewNovember2006.php>.

<sup>48</sup> WIS. STAT. ANN. § 7.52 (West 2011).

<sup>49</sup> Larry Sandler, *New Controls Urged for Absentee Ballots*, MILWAUKEE JOURNAL SENTINAL, Oct. 17, 2008, at B1. Many of the registrations with invalid addresses were removed. It is interesting to note that EDR states like Wisconsin can afford to be more aggressive in removing voters from the rolls than other states, because in the case of accidental and wrongful removal from the rolls the consequence is mitigated by EDR: The voter can simply re-register on election day, provided they have proper identification and meet other requirements.

<sup>50</sup> Sherif Durhams, *State to Purge Some Voting Records*, MILWAUKEE JOURNAL SENTINAL, Mar. 9, 2009, available at Westlaw, 2009 WLNR 4499360.

<sup>51</sup> Larry Sandler, *Task Force to Target Election Complaints*, MILWAUKEE JOURNAL SENTINAL, Mar. 9, 2008, available at Westlaw, 2008 WLNR 17664019.

<sup>52</sup> Greg J. Borowski, *Council OKs Election Chief But Mayor’s Office Ripped on Questions Over Her Pension*, MILWAUKEE JOURNAL SENTINEL, July 7, 2005, at B1.

<sup>53</sup> Sandler, *supra* note 51.



## CHAPTER FOUR: ILLINOIS

AS IN OUR ORIGINAL STUDY, we remain concerned about election administration in Illinois. Were it a swing state, we fear it would have even more problems than Ohio. Though Illinois has many excellent administrators at the local level, it lacks a strong and trusted chief election officer to help these local administrators work together and follow processes uniformly. As pointed out in our original study, this defect almost ensures significant variation across jurisdictions in how laws are applied and election procedures followed.

On the positive side, Illinois is a leader in voting access and has the most widely-used in-person early voting program of our five states. The state is also adopting no-excuse absentee voting to expand access further. This has obvious advantages, but also presents new challenges as Illinois continues to experience absentee ballot fraud. Illinois election administrators will have to be vigilant to ensure that expanded absentee voting procedures are not abused to perpetrate greater fraud. The state will also have to examine other election processes, such as ballot security measures, to see that they still make sense in a system with increased absentee voting.

Given the lack of coordination and uniformity across the state, and because the specter of fraud has the potential to taint public perception of elections, Illinois likely would not fare well in a Minnesota-style election contest. After exploring in more detail what would happen if the facts of the 2008 Minnesota Senate race were transplanted to Illinois, this chapter then discusses Illinois' lack of a strong statewide chief elections officer, together with news of some improvements in this area. It concludes

with a discussion of early and absentee voting in Illinois.

### HOW WOULD ILLINOIS HANDLE A HIGH-PROFILE ELECTION CONTEST?

In our estimation, the Illinois election system would perform poorly in a statewide federal election contest analogous to Minnesota's 2008 experience, for three reasons. First, the recount and election contest laws contain unnecessary procedural burdens and court decisions that seem impractical and almost tangibly unfair. Second, the current chief election authority, the State Elections Board, is not sufficiently trusted to keep adequate control over the process. Third, credible allegations of absentee ballot fraud might taint the election.

One problematic feature of election law in Illinois is that, like Ohio, the state does not permit ordinary election contests for federal office. In 1977, the Illinois Supreme Court determined that federal election contests cannot occur in Illinois because they are not explicitly authorized by state statute.<sup>1</sup> The implication seems to be that while candidates for state office can challenge an election result, federal candidates have no remedy except perhaps a constitutional challenge, mandamus action, or other prerogative writ such as quo warranto. And even this is not clear under state law.

But Illinois' system is yet more flawed than Ohio's, because Illinois does not allow federal candidates a full recount: Illinois law generally permits only 25% of precincts to be recounted.<sup>2</sup> Importantly, the results of this "discovery recount" are unofficial and only for informational purposes to set up an election



contest.<sup>3</sup> A full recount can then occur in the election contest,<sup>4</sup> except that federal election contests are not permitted in Illinois. Furthermore, even if federal contests were permitted, *the full recount cannot occur unless the judge hearing the suit finds a reasonable likelihood that performing the full recount would change the result of the election.*<sup>5</sup> An added complication is that courts have not been able to agree on the test for measuring whether this standard has been met. Some courts have said it is sufficient if the request for recount filed with the election contest petition *alleges* that a full recount would likely change the result of the election. On the other hand, in 1983 the Illinois Supreme Court determined under a prior but similar statutory standard that it is not sufficient to *allege* that a full recount would likely change the result, because the court can go “behind the pleadings” to look at whether the allegations in the pleadings are credible based on the 25% recount and dismiss the case if the allegations are not found credible.<sup>6</sup> How this standard would actually play out in practice is not clear, but it could leave a court with wide discretion.<sup>7</sup>

These are the rules in Illinois, yet we have doubts about whether future courts would be comfortable reaching the harsh conclusion that aggrieved federal candidates have no remedy except a 25% recount that cannot change the official result. Instead, a court might insist on finding some grounds for ordering and supervising a full recount in a federal race, even though it lacks clear authority or standards for doing so. The result would likely not be a robust judicial decision invulnerable to partisan attack or other criticism. Accordingly, the Illinois legislature should authorize federal election contests soon, before it is faced with

something like the Minnesota 2008 U.S. Senate race.

In situations in which a full recount is ordered, Illinois may lack the administrative capacity to conduct the recount in a sufficiently organized and uniform manner. Even in Minnesota, despite the fundamental spirit of trust and cooperation that administrators had in the process, and despite strong and respected central leadership from the Secretary of State’s office, the state still had significant difficulty in properly following procedures for counting absentee ballots. Illinois does not enjoy the same public-spiritedness that Minnesota does, and the degree of coordination between many local administrators and the State Board of Elections is weak to non-existent. In a high-profile race scrutinized in microscopic detail, it would be difficult for Illinois to perform a statewide recount successfully. While the Illinois Supreme Court might exercise some control over the recount, the court possesses neither the deep knowledge of elections nor the managerial expertise that the Minnesota Secretary of State’s office deployed so crucially in the 2008 election. The absence of a similarly trusted statewide recount authority in Illinois would almost certainly ensure that different jurisdictions would understand recount procedures differently. Furthermore, given that most Illinois election administrators are county clerks elected on a partisan ticket,<sup>8</sup> there is a risk that some of them would deliberately interpret grey areas in the law to benefit the candidate of their party. Procedural differences across county lines could generate layers of complicating litigation occurring not only in the Illinois Supreme Court, but in the federal courts as well.

## **ABSENTEE VOTING ISSUES IN AN ILLINOIS ELECTION CONTEST**

The Minnesota Senate race showed how absentee balloting is one of the most likely areas for dispute in an election contest. In November 2008, only 2.6% of Illinois voters cast absentee ballots, a very low level compared to states like Ohio, Michigan, and Wisconsin (see Table Six above).<sup>9</sup> The low level of absentee voting promotes finality by reducing the importance of thorny absentee voting issues. However, in late 2009 the state adopted no-excuse absentee voting, and absentee voting increased significantly in some locations in 2010, although in the absence of an Obama-like candidacy it declined overall.<sup>10</sup> As another Presidential election year rolls around and candidates incorporate the new mail-in voting into their campaigns, we expect the statewide level of mail-in voting to increase.

A contestant looking into absentee balloting issues in an election contest would examine chain-of-custody records, insofar as they exist, to see if ballots had disappeared or extra ballots had been added to the count; look for instances where the rules for distinguishing properly cast absentee ballots from improperly cast ballots were not applied properly or uniformly; and explore whether timely ballots had been mistakenly rejected as untimely. The most likely area for a challenger to discover provable irregularities would involve whether absentee ballots were improperly accepted or rejected. In Illinois, absentee ballots must be counted unless one of several statutorily defined defects is present.<sup>11</sup>

While this statutory guidance may appear clear on its face, post-election litigation concerning similar statutes in Minnesota and Ohio has

shown that specific statutory language alone is not necessarily enough to ensure uniform application. For example, in Minnesota's 2008 contest, some Minnesota counties were rejecting absentee ballots when records showed that the required witness to the ballot was not a registered voter, while other counties were not checking the registration status of witnesses at all. Similarly, Ohio statutes were not clear enough to give adequate guidance as to whether provisional ballots should be counted when their accompanying paperwork included the voter's name but was lacking signature, included the voter's signature but was lacking the voter's block-letter name, or included the voter's name and signature but in the wrong location on the paperwork. When the Secretary of State issued a last-minute directive to clarify these questions, it prompted litigation in the Ohio Supreme Court,<sup>12</sup> which ultimately disagreed with the Secretary's instructions on all three situations, confirming just how much room for interpretation there can be over what at first may appear to be simple issues.

A very different kind of allegation in an election contest would be that absentee ballots were cast fraudulently or that legally cast absentee ballots were deliberately tampered with after the fact in an effort to change the result. Absentee ballot fraud can be committed by intercepting and altering ballots, intercepting and destroying them, vote buying, casting ballots under old or fraudulent registrations, or by improperly influencing a voter in casting an absentee ballot, all of which are criminal offenses under the Illinois election code.<sup>13</sup> Although most of these methods have been used in Illinois in the past, today the most prevalent method appears to be improperly influencing voters who are casting absentee ballots.<sup>14</sup> Typically, the perpetrator observes

the casting of the ballot and pressures the voter to vote for the desired candidate, or even asks the voter to surrender the unvoted ballot so that the perpetrator can cast it.

We continue to view it as unlikely that election administrators or others in Illinois would deliberately commit absentee ballot fraud with the specific intent of affecting a statewide election, if only because the magnitude of fraud necessary to affect the result would be so large and require so many conspirators that it would carry a huge risk of exposure. As our original study noted, absentee ballot fraud with the intent of affecting local races with only a small number of ballots seems much more likely. Since that time additional small-scale election fraud schemes have been exposed in Chicago,<sup>15</sup> East St. Louis,<sup>16</sup> and the surrounding county of St. Clair,<sup>17</sup> including the town of Cahokia.<sup>18</sup>

The effect of this kind of fraud on a statewide election might be only incidental to the intent, but nevertheless in the case of a razor-thin margin the result would be unacceptable, no matter how conscientiously the election contest court tried to determine the true winner. Thus, instances of proven absentee ballot fraud could threaten the credibility of the entire election, even if the apparent margin of victory was greater than the number of known fraudulent ballots. This would put tremendous pressure on the election contest court to throw out the entire election and order a new one, a remedy that is fraught with problems of its own.<sup>19</sup> There is some precedent for this remedy in Illinois, at least in the trial courts.<sup>20</sup>

The ideal remedy for absentee ballot fraud, or any other situation where invalid ballots have made it into the count, is exclusion of the problematic ballots from the vote count. However, in most cases the tainted ballots

will already be inseparably mixed with valid ballots, making the content of the tainted votes unknowable. Illinois courts have variously prescribed throwing out all absentee ballots in the affected precincts,<sup>21</sup> subtracting (“apportioning”) the absentee ballots from the candidates’ totals in proportion to the percentage of voters in the affected precinct who belong to each political party,<sup>22</sup> subtracting the absentee ballots from the candidates’ totals in proportion to an untainted ballot pool from the precinct,<sup>23</sup> or even, when there is no untainted ballot pool to draw from, subtracting in proportion to a tainted ballot pool<sup>24</sup>—a particularly unsatisfying remedy. The courts have not articulated any rule for choosing among these various remedies, and from reading their opinions, it often appears that they are not even aware that other courts within the state have taken different approaches.

The election contest court might have difficulty finding a way to reconcile all of these apparently conflicting precedents, and for that reason any result it reached could be called more easily into question. The Minnesota contest could have confronted similar issues over the commingled ballots problem when Coleman alleged that an unspecified number of absentee ballots had been wrongfully counted and mixed in with others, but was saved by a state statute and Supreme Court precedent that clearly indicated Coleman had waived his right to complain of these ballots when his team did not object to them on election night, when they were counted. But Illinois does not currently have such a precedent and would presumably have to deal with this issue head-on.

## **CONTINUING LACK OF MEANINGFUL STATEWIDE SUPERVISION**

Our original study noted that one of the fundamental characteristics of the Illinois election system was its lack of any central authority with real credibility or power. The true power resided in local officials, who for the most part acted on their own and ignored the State Board of Elections (“SBE”), which was quite limited in its funding, personnel, access to ground-level information, and formal power. That situation remains largely unchanged, but continuing implementation of the statewide voter registration database has forced locals to work with the SBE on a regular basis, and there is hope that this could build more respect and trust between the various local offices and the SBE. The statewide database also gives the SBE the ability to peer into some aspects of local administration, allowing it to catch errors or important variations in policies across jurisdictions. This mitigates one of the primary obstacles to achieving more uniformity in procedures across the state—namely, the fact that historically the SBE has simply had no way of knowing what was going on locally in many counties. The initial post-HAVA political battle between the SBE and local officials over what role these entities would play in the operation of the database also is receding into the past, providing further hope that a spirit of cooperation may grow.

Nevertheless, many aspects of the Illinois election system remain disorganized, fragmented, and subject to important jurisdictional variations in procedure. Although our original study addressed several procedures that administrators believe may vary across jurisdictions, the 2008 Minnesota Senate race suggests that the biggest issue likely is the variation across jurisdictions in

the standards used to accept absentee ballots. Another potential problem is variation in the accuracy and transparency of the canvassing process, which we previously predicted would become an issue in the future. The problem stems from a change in state law that gave county administrators sole responsibility for canvassing and certifying official vote totals, a process that previously required a bipartisan team that included the local administrator and leaders of the local political parties.<sup>25</sup> While we are not aware of any deliberate fraud yet occurring, the SBE has subsequently identified several innocent errors in canvassing that might have been prevented in the old system. These errors included, but were not limited to, losing votes when “merging” results, failing to include certain absentee ballots in reported vote totals, double-counting absentee ballots, and failing to account for several hundred ballots that had been forgotten in the auxiliary bin of a voting machine and that had not made it into the initial count. Once discovered, all of these errors were fixed, but the SBE worries that similar errors are going unnoticed and uncorrected in various offices across the state.

Another procedural variation concerns the time of tabulating absentee ballots. Absentee ballots used to be sent to polling places and counted by poll workers on election night, but a 2006 law now permits counting to occur centrally.<sup>26</sup> The actual counting cannot occur until the night of the election, but the law allows administrators to run the ballots through the machines earlier as long as they wait until election night to release the actual vote totals. Jurisdictions are making their own decisions about whether to run the ballots earlier. While this procedure saves time, it also is less secure because the election observers who have a right to attend the central counting of absentee ballots do not witness the actual ballots being

run through the machine, and instead see only administrators pressing the button that prints out the vote totals. The process thus is less transparent, and errors are less likely to be uncovered.

## INCREASING ACCESS AND CONVENIENCE

Illinois saw impressive numbers of voters in the November 2008 election, presumably because of the historic candidacy of favorite son Barack Obama. However, there were other factors that may have boosted turnout, including Illinois' relatively new programs of early voting and "grace period" registration, both of which were used for the first time in a Presidential election in 2008. Furthermore, in late 2009 the Illinois legislature passed a law that will allow voters in future elections to request and cast absentee ballots without an excuse. This confluence of policies that lower procedural barriers to voting makes Illinois one of the more accessible states in our five-state study, despite the fact that it does not have Election Day Registration. This increasing accessibility has many consequences for voters, both good and bad.

**Early voting.** The state's early voting program in particular has a number of positive benefits, beyond just the convenience to the voter, that improve the entire elections system. Illinois administrators know this and for that reason promoted early voting heavily in 2008, causing an impressive 19.5% of all ballots in the state to be cast using the early voting system.<sup>27</sup> The high early voting turnout decreased Election Day turnout, reducing the potential for long lines and other bottlenecks, but it also did much more. Because the procedures used to conduct early voting in Illinois so closely resemble traditional polling-place voting procedures, early voting gives the community the chance to identify ahead of time procedural problems that

might occur on Election Day. Furthermore, by reducing Election Day turnout, early voting reduces the number of voting machines and poll workers that are necessary to maintain a satisfactory pace of voting on Election Day. Thus, on the same Election Day budget, early voting allows administrators to keep a surplus of machines and personnel in the polling place to add extra capacity or as backup. It also allows them, if they so choose, to purchase and maintain fewer voting machines and hire fewer poll workers yet achieve the same level of throughput that they could achieve in a non-early-voting system. Because of such efficiencies, the Kane County clerk estimates that early voting may save his office one million dollars over a ten-year period. In 2008, Cook County was able to eliminate 10% of all polling places and deploy more machines per polling place.

A final advantage of early voting is that it is considered more secure than absentee voting, which is more susceptible to fraud.<sup>28</sup> In fact, absentee voting has decreased significantly since early voting has been available in the state. None of the four other states in this study have achieved as much success in promoting an early voting program.

One downside to early voting in Illinois in the 2008 election was long lines at early voting locations. The massive early voting turnout exceeded the expectations of administrators, and some voters had to wait up to four hours to cast their ballots. Of course, while having to wait to vote early is bad, it is better than having to wait on Election Day, when it is not possible for voters who experience long lines to solve the problem by leaving and returning to vote at a later date. Furthermore, Illinois' early voting lines should be shorter in future elections because the advent of no-excuse absentee

voting will draw some voters away from early voting. Administrators are also refining their estimates of the number of workers and voting machines that must be present in each polling place in order to move early voting along at a brisk pace.

***Grace period registration.*** 2008 was also the first Presidential election in which Illinois voters could register late using the state's "grace period registration" program. Grace period registration allows voters to register in person as late as seven days before the election, giving them an additional twenty-one days to register after the twenty-eight-day deadline for traditional registration. Approximately 23,000 individuals used grace period registration in Illinois for the 2008 election, up from about 6,400 in 2006. Grace period registrants are not permitted to cast traditional ballots on Election Day, but may cast only absentee ballots or "grace period ballots" that are cast in-person immediately after completing the grace period registration process (legally speaking, this is a separate procedure from early voting, though similar). Thus, to the extent that it is used, grace period registration creates greater throughput by steering voters away from polling place voting, where bottlenecks are most likely to occur. Except for the fact that it occurs before Election Day, this process is similar to the process that voters may use in Minnesota and Wisconsin to register on Election Day at the polls and cast a ballot then and there. It is also similar to Ohio's controversial "Golden Week" that began thirty-five days before the election and ended thirty days before, during which time voters in a one-stop transaction could register and cast an in-person absentee ballot without an excuse. The ability of voters to register and vote in a single visit to the clerk's office, in addition to being convenient, has been shown to increase voter turnout when

conducted on Election Day.<sup>29</sup> While it is not certain that this same increase occurs when the one-stop transaction is only available prior to Election Day, it seems reasonable to expect at least some increased turnout to occur.

***No-excuse absentee voting.*** 2010 was the first year in which Illinois voters had the opportunity to cast absentee ballots in a federal election without having to provide an excuse, such as sickness or being out of town. Only about 1.1% of voters statewide used the new procedure,<sup>30</sup> but we expect that percentage to rise in 2012 as more voters learn of the procedure and as Obama's reelection campaign renews the interest of Illinois voters. This added yet another layer of convenience for busy voters and gave them the opportunity to cast a ballot without ever having to travel to a polling place. Other states with no-excuse absentee voting report usage rates between about 4% (New Jersey) and close to 25% (Ohio).<sup>31</sup> If Illinois can achieve high participation in its no excuse program, it will take substantial pressure off both early voting sites and Election-Day polling places, helping to reduce wait times. Thus, no excuse absentee voting will improve not only the experience of the absentee voter, but it will also have positive externalities for all voters and the elections system as a whole.

At the same time, however, no excuse absentee voting will subject the Illinois elections system to a greater risk of illegal ballots being cast and counted in the state. This is because most elections scholars and others involved in the elections process believe that it is much more difficult and risky to go into a polling place and cast a ballot illegally by impersonating a voter than it is to cast an illegal ballot by mail. No excuse absentee voting will increase the risk of such fraud going undetected in at least two ways. First, it will expand the overall



universe of absentee ballots cast, making a larger haystack in which administrators must try to find the needle of voting fraud. As an example, the anti-fraud systems traditionally used in Chicago and Cook County depend in part on identifying geographic “spikes” in ballot requests that suggest political operatives in specific neighborhoods are persuading individual voters to request absentee ballots for the purpose of committing fraud. In a no-excuse world where anyone could request an absentee ballot, these spikes will be harder to detect, or may not stand out at all. Furthermore, because it will no longer be necessary to provide an excuse, administrators will no longer be able to identify fraud by looking to see whether the reasons provided seem suspicious (e.g., 50% of people in one apartment building claiming they will be out of town on Election Day), as some administrators currently do.

The second way that no-excuse absentee voting could increase the risk of fraud is by actually

increasing the number of fraudulent absentee ballots cast (as opposed to merely making it more difficult to detect whatever amount of fraud is committed today). If criminals feel that administrators are less able to detect fraud because Illinois has moved to a no-excuse system, then they may increase their efforts accordingly.

Despite these concerns, most election officials with whom we spoke did not feel that moving to a no-excuse system carried with it an increased risk of fraud, although one office did admit that its systems for detecting fraud will have to be retooled to remain effective. We do not mean to overstate the prevalence of voting fraud – which available evidence indicates is very rare, in Illinois and elsewhere – but wonder whether these administrators were too complacent about the potential problems that widespread absentee balloting might have in a state like Illinois.

**TABLE SEVEN: CONVENIENCE VOTING ACROSS THE FIVE STATES IN 2010**

	Early voting period (stated in days prior to the election)	No excuse absentee	Last registration deadline (stated in days prior to the election)	“Golden week” period (stated in days prior to the election)
Illinois	22-5	Yes	14	22-14
Ohio	35-1	Yes	30	35-30
Michigan	None	No	30	N/A
Minnesota	None	No	0	N/A
Wisconsin	?-1*	Yes	0	?-1*

\* Wisconsin does not have an “early voting” program as such, but does allow voters to cast absentee ballots in-person at the office of the election administrator without an excuse. In function if not form, this amounts to an early voting program. However, the law does not state the mandatory beginning time when these in-person absentee ballots must be furnished to voters upon request.



## REFERENCES

<sup>1</sup> *Young v. Mikva*, 363 N.E.2d 851, 852-53 (Ill. 1977).

<sup>2</sup> 10 ILL. COMP. STAT. ANN. 5/22-9.1 (West 2011).

<sup>3</sup> “Discovery recounts,” as they are called, do not affect the result of the election. Rather the purpose may be to determine whether there is a basis for moving forward with election contest proceedings. See *Potts v. Fitzgerald*, 784 N.E.2d 420, 423 (Ill. App. Ct. 2003).

<sup>4</sup> 10 ILL. COMP. STAT. ANN. 5/23-23.2 (West 2011).

<sup>5</sup> *Id.*

<sup>6</sup> See *In re Contest for Governor*, 444 N.E.2d 170, 190 (Ill. 1983) (Ward, J., dissenting) (“The majority says that the election contest statute is to be construed so that if a candidate considers that he was properly elected to office, and the office is denied to him through mistake, fraud or irregularity in the election, the candidate must do, in practical terms, the impossible. He must be able within 15 days of the proclamation of the result of the election to demonstrate, through what is in effect his own recount, from the recorded election results in 102 counties that he is being wrongfully deprived of the office to which he was, in fact, elected.... It is impossible for a candidate to conduct discovery in every jurisdiction in such a short period of time.”).

<sup>7</sup> For a thorough discussion of these and other confusing interpretations of the standard for obtaining full recounts in Illinois, see *Andrews v. Powell*, 848 N.E.2d 243, 250 (Ill. App. Ct. 2006).

<sup>8</sup> 10 ILL. COMP. STAT. ANN. 5/22-9.1 (West 2011).

<sup>9</sup> The contrast is starkest with respect to Ohio: 30% of the Ohio ballots cast in November, 2008 were cast absentee, with another 3% cast provisionally. <http://www.sos.state.oh.us/sos/upload/elections/2008/gen/amendedgeneralcombined.pdf>. Illinois, on the other hand, in 2008 had only about 2.6 % of ballots cast absentee, and only 0.7 % cast provisionally. Email from Cristina Cray, Legislative Liaison, Illinois State Board of Elections, Sept. 14, 2009.

<sup>10</sup> In 2008, 134,918 out of 976,135 voters cast mail-in absentee ballots. Email from Cristina Cray, Legislative Liason, Illinois State Board of Elections, June 17, 2011. In 2010, only 42,644 ballots out of 3,792,770 were mail-ins.

<sup>11</sup> 10 ILL. COMP. STAT. ANN. 5/19-8; 19-11 (West 2011).

<sup>12</sup> *State ex rel. Skaggs v. Brunner*, No. 2009-2206 (Ohio Nov. 13, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/skaggsv.brunner.php>.

<sup>13</sup> 10 ILL. COMP. STAT. ANN. 5/29-20 (West 2011).

<sup>14</sup> See, e.g., *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1204 (Ill. App. Ct. 2004).

<sup>15</sup> Matthew Walberg, *50<sup>th</sup> Ward Vote Fraud Outlined as Trial Starts*, CHI. TRIB., Nov. 10, 2009, at 7.

<sup>16</sup> Carolyn P. Smith, *Former East St. Louis Councilman Accused of Tax Evasion, Voter Fraud*, BELLEVILLE NEWS-DEMOCRAT (Ill.), Apr. 9, 2010, available at Westlaw, 2010 WLNR 7364793.

<sup>17</sup> Beth Hundsorfer, *Vote Fraud Uncovered, Haida's Office Finds Up to 10 Cases in Absentee Applications*, BELLEVILLE NEWS-DEMOCRAT (Ill.), Jan. 30, 2010, available at Westlaw, 2010 WLNR 1989322.

<sup>18</sup> George Pawlaczyk, *Witnesses in Vote Fraud Trial Say They Gave Absentee Ballots to Cahokia Candidates*, BELLEVILLE NEWS-DEMOCRAT (Ill.), Apr. 6, 2010, available at Westlaw, 2010 WLNR 7123322.

<sup>19</sup> See Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265 (2007).

<sup>20</sup> See *Hileman v. Maze*, 367 F.3d 694, 695 (7<sup>th</sup> Cir., 2004); *Hileman v. McGinness*, 739 N.E.2d 81, 83 (Ill. App. Ct. 2000).

<sup>21</sup> See *Webb v. Benton High School Dist. No. 103 in Franklin County*, 264 N.E.2d 415 (Ill. App. Ct. 1970); *Emery v. Hennessy*, 162 N.E. 835 (Ill. 1928); *Lehman v. Hill*, 111 N.E.2d 120 (Ill. 1953).

<sup>22</sup> See *Leach v. Johnson*, 313 N.E.2d 636 (Ill. App. Ct. 1974). However, party-based apportionment may be inappropriate in some cases. For instance, one court held it should not be used when an independent candidate is a party to an election contest. This would not be fair to the independent candidate because “only candidates affiliated with a political party can lose votes when this method is applied, while an independent candidate cannot lose votes.” *In re Purported Election of Durkin*, 700 N.E.2d 1089, 1095 (Ill. App. Ct. 1998).

<sup>23</sup> See *id.*

<sup>24</sup> See *Hileman v. McGinness*, 739 N.E.2d at 81; *Jordan v. Officer*, 525 N.E.2d 1067 (Ill. App. Ct. 1988); *Webb*, 264 N.E.2d at 415.

<sup>25</sup> 10 ILL. COMP. STAT. ANN. 5/22-1 (West 2011).

<sup>26</sup> ILL. PUBLIC ACT 94-1000 (2006), *available at* <http://www.ilga.gov/legislation/publicacts/94/PDF/094-1000.pdf>.

<sup>27</sup> Email from Cristina Cray, Legislative Liason, Illinois State Board of Elections, June 17, 2011. In 2010, only 3.7% of voters cast early ballots, but that figure may have been depressed by the relative novelty of the procedure and the absence of a Presidential contest. The percentage is likely to increase in the future.

<sup>28</sup> The SBE investigated “hundreds” of instances of potential double-voting, where individuals were alleged to have cast early ballots and then returned on Election Day to cast ballots again. However, in the end the SBE found only two instances of this actually occurring, and in both cases the ballots cast on Election Day were provisional ballots that were not ultimately counted.

<sup>29</sup> *See, e.g.,* Craig Leonard Brians & Bernard Grofman, *Election Day Registration’s Effect on U.S. Voter Turnout*, 82 SOCIAL SCIENCE QUARTERLY 170 (2001), *available at* <http://www.socsci.uci.edu/~bgrofman/18%20Brians-Grofman-Election%20day%20registration’s%20effect.pdf>.

<sup>30</sup> Email from Cristina Cray, Legislative Liason, Illinois State Board of Elections, June 17, 2011.

<sup>31</sup> *See* United States Election Assistance Commission, *2008 Election Administration and Voting Survey 25*, *available at* <http://www.eac.gov/assets/1/Documents/2008%20Election%20Administration%20and%20Voting%20Survey%20EAVS%20Report.pdf>.

## CHAPTER FIVE: MICHIGAN

OUR ORIGINAL STUDY CONCLUDED that Michigan's election system was essentially sound, and particularly benefited from strong and respected central leadership provided by the Elections Division of the Michigan Secretary of State. At the same time, we worried that elections in some areas of Michigan, including Detroit, had a history of absentee ballot improprieties, and might remain vulnerable to corruption and mismanagement. Three years later, these same two themes—strong statewide leadership but local vulnerabilities—continue to apply, along with a third feature, the inability of the legislature to agree on election modernization proposals. If that legislative paralysis persists, Michigan risks losing some of its status as a nationwide leader in election administration. In the meantime, election officials throughout the state, led by the Secretary of State's office, have been looking for ways to modernize administrative practice even without new legislation.

Still, Michigan's election ecosystem is relatively stable at the moment and has not experienced the political controversies over election administration that Ohio, and to a lesser extent Wisconsin, have seen. The 2008 election ran smoothly, and Michigan has generated no Ohio-style sweeping lawsuits alleging that the entire elections system is fundamentally unfair, nor any high-profile post-election suits seeking to influence the result of a particular election. Michigan has also thus far avoided any conflicts over the "matching" or verification of information on incoming voter registration applications, and the Secretary of State's office remains well respected and continues to build strong relationships with local officials based on mutual trust. Whether this stability would

survive a Minnesota-type election dispute remains to be seen.

Like the other chapters of this book, this chapter begins by analyzing a hypothetical scenario in which Michigan is faced with the kind of very close election that occurred in Minnesota's 2008 U.S. Senate race. It then considers the special problem of elections in Detroit and discusses current efforts at reform.

### HOW WOULD MICHIGAN HANDLE A HIGH-PROFILE ELECTION CONTEST?

If Michigan faced a statewide election contest comparable to the situation that Minnesota faced in its 2008 Senate race between Al Franken and Norm Coleman, it likely would come out looking better than Illinois and Ohio, but might suffer in comparison to Wisconsin. Michigan enjoys many advantages that reduce the ability of candidates to successfully call into question the true winner of an election, including a low number of provisional ballots<sup>1</sup> and a respected central elections authority that has the kind of credibility with local officials that promotes fairness and uniformity in a recount. Michigan also has a comparatively modest voter ID requirement that would make it hard for a candidate to credibly claim that misapplication of voter ID rules affected a large number of ballots. Further, the state's all-optical scan voting system minimizes concerns about hacking and provides better records (the ballots themselves) for recounts. The optical scan system is governed by clear laws that define which kinds of marks on a ballot do and do not constitute a vote.<sup>2</sup>

However, we worry for several reasons that Michigan would not be able to resolve a

disputed statewide election as smoothly as Minnesota. The current political climate in Michigan, though less heated than in Ohio and Illinois, probably would fail to produce the spirit of good faith that reduces reckless accusations of mismanagement and fraud. Unfortunately, the partisan divide extends all the way up to the Michigan Supreme Court, which has a reputation for engaging in bitter partisan squabbles, as we noted in our original study.<sup>3</sup> In addition, few institutional checks and balances guard against the potential for partisanship at the administrative level. Finally, a statewide recount might be incomplete and unsatisfactory if the state adheres to archaic recount rules that prohibit entire precincts of ballots from being recounted if certain security procedures are not followed in those precincts, as they too often are not.

***Institutional frailties.*** While Michigan does not have the troubled political culture of Illinois, it seems more vulnerable to partisanship and corruption than Minnesota. Because the state does not have as many institutional checks against partisanship as it might, a Minnesota-type election contest could degenerate into a nasty political fight. At the state level, Michigan's Secretary of State is an elected official with a known partisan affiliation and an obvious conflict of interest in resolving a disputed election between a Democrat and a Republican. The fact that the recent Secretaries of State of both parties have conducted themselves admirably and avoided accusations of partisanship to date does not alleviate this concern, nor mean that future Secretaries of State will always avoid the potential for abusing their power for partisan ends. At the local level as well, most administrators hold partisan, elected offices, although a few jurisdictions use appointed administrators.<sup>4</sup> No jurisdiction is run by a bipartisan board of the kind that

is found throughout Ohio and in some parts of Wisconsin and Illinois. A bipartisan local board of this kind might have prevented or mitigated the absentee balloting abuses exposed in the 2005 Detroit mayoral election, which were discussed in our original study and are explained further below.

Bipartisan teams do conduct the *post-election* processes of counting and recounting in Michigan.<sup>5</sup> However, if a *Coleman v. Franken* analog reached the Michigan judiciary, Michigan would face perhaps its greatest challenge: Resolving an election contest in a way that would be perceived as fair and impartial. The initial proceeding, likely in the form of *quo warranto* (Michigan's version of an election contest),<sup>6</sup> would be heard by the elected judges of the state court of appeals.<sup>7</sup> Their decision then would likely be appealed to the state's highest court. Unfortunately, according to a 2008 University of Chicago study of the quality of state high courts, the Michigan Supreme Court received the lowest rating of all the fifty states, in a combined measure of productivity, influence, and political independence.<sup>8</sup> In the past, the justices have made personal attacks on one another, both in written opinions and in material leaked to the media.<sup>9</sup> If a high stakes election dispute reached this court, we remain concerned that it might have difficulty inspiring the public confidence necessary to a credible determination of an election contest.

***"Unexcused" absentee balloting.*** One of the most obvious strategies to attack the result of an election, but one that did not arise in Minnesota (perhaps for strategic reasons), works only in states like Michigan where absentee voting requires an excuse: hunt down absentee voters who had no valid excuse for using absentee ballots and attempt to disqualify their ballots. There are likely to be thousands of such voters

in a statewide election, and there are particular reasons for concern in Michigan.

Partly because it believed that voters were increasingly “fibbing” by making up an excuse on their absentee ballot applications, Wisconsin moved to a no-excuse system in the year 2000. Ohio and Illinois also have adopted the practice. Michigan has not made such a move, yet the percentage of its voters who use absentee voting continues to increase, just as in Wisconsin. Data for the 2000 presidential election are not available, but the number of absentee ballots cast and counted in the state (including both absentee ballots cast in-person and by mail) increased approximately 46% between 2004 and 2008.<sup>10</sup> While part of this may be explained by an increasingly mobile population that is more likely to be out of town on Election Day, it probably also indicates a change in cultural attitudes towards convenience and away from the formality of appearing at the polls. Michigan needs to investigate this trend to discover whether it is in fact due to unlawful voting. If it is, the state either needs to start addressing the problem or move to a no-excuse system.

Until then, the problem is made worse by the fact that some parts of Michigan use absentee balloting much more heavily than others. For instance, in 2004 absentee ballots accounted for approximately 30% of ballots cast in Detroit,<sup>11</sup> compared to about 18% in the rest of the state. Of course, demographic differences in urban populations may explain some of this, but to the extent that citizens of Detroit are neither sicker nor more frequently homebound or on the road than other Michigan voters, they could be more prone to abuse the absentee ballot process. Furthermore, because Detroit is heavily Democratic, the upshot is that a Republican candidate could attempt to challenge absentee

ballots from that jurisdiction without much fear of disqualifying a larger proportion of his or her own voters. Likewise, a Democratic candidate might attempt to disqualify absentee ballots in heavy Republican areas.

Of course, disqualifying absentee ballots that have already been counted is easier said than done. At a late stage in the Minnesota proceedings, Coleman argued that a number of absentee ballots were ineligible and should be thrown out. However, the ballots he attacked had already been counted and inseparably mixed in with other ballots, so that even if it was proven that the ballots were invalidly cast, it would be impossible to remove them from the count. The Minnesota courts disposed of Coleman’s arguments by relying on a statute that required disputes over the eligibility of absentee ballots to occur at the time of counting or not at all. Additionally, the courts said that, even assuming Coleman could prove that a number of invalid ballots had been accidentally counted sufficient to render the result unclear, the court had no power to invalidate the election, therefore no remedy was available.

Michigan law probably would not allow courts to dispose of such claims so easily. Michigan does not have a statute precluding post-election challenges to counted absentee ballots. Furthermore, on at least one occasion,<sup>12</sup> the Michigan Supreme Court threw out the result of a small-town annexation ballot issue upon a finding that illegal balloting *might* have affected the outcome (although the court might be more reluctant to grant such an extraordinary remedy in a higher-profile, statewide election that is more complicated and expensive to re-hold). It also has approved proportionately reducing candidates’ vote totals when unlawful ballots have been inextricably mixed in to the count,<sup>13</sup> an approach that Michigan appellate courts

have followed as recently as 1989,<sup>14</sup> though the approach has fallen out of favor elsewhere.<sup>15</sup>

***Allegations of fraud.*** Also of concern is whether a high-profile election dispute would lead to significant allegations of fraud or other impropriety. Although Michigan seems to have avoided the kind of media attention given to states like Wisconsin,<sup>16</sup> where allegations of “voter fraud” occasionally are leveled, in fact the 2005 Detroit city primary and general elections provide a recent example of significant, intentional misconduct occurring in the state (this story is discussed in more detail below). Paradoxically, no significant, intentional impropriety has been uncovered in Wisconsin, although a small number of felons may have unintentionally violated the law by voting when they did not know they were disenfranchised under state law.<sup>17</sup> Even Illinois, with its problematic reputation, has very few recent examples of election officials personally violating the law in order to change the result of an election.

However, even if fraud occurred, it could only change the result of the election if it was proven to have tainted enough ballots to affect the outcome or was so blatant and disturbing that the court felt it was appropriate to invalidate the entire election — something most courts would avoid in all but the most egregious cases.<sup>18</sup> Establishing this level of misconduct could be quite difficult because the affected ballots would probably already be cast and counted, and proof would have to rely on oral testimony and documents such as poll books and absentee ballot paperwork that typically cannot be tied to any particular ballot.

***Unrecountable precincts.*** Unlike the other states in our study, Michigan law renders ballots “unrecountable” when post-election chain

of custody procedures are not followed. For instance, where ballot bags and boxes are not properly sealed after the precinct canvass or where the identification numbers of the seals are not properly recorded in the poll book, the ballots are not recountable.<sup>19</sup> The purpose of the rule is obviously to prevent fraud and ensure that recounts include only those ballots that have been protected against tampering during the interval between Election Day and the recount. However, a side-effect of the rule is that, even when everyone agrees there has been no tampering and a particular box of ballots is valid, nevertheless those valid ballots are excluded from the recount. In that case, the original count from that precinct would be accepted in the recount, even if in fact it was inaccurate.<sup>20</sup> This formalistic approach has the benefit of giving clear guidance to officials and courts considering the matter, but does not take context into account or accord with the principle of enfranchising as many voters as possible where there has been substantial, though imperfect, compliance with requirements. In our opinion, this rule creates an unnecessary conflict between two of the three core values of this study—integrity and finality. The practical import for a Minnesota-type election contest where the whole nation was watching is that the tribunal would face a difficult choice: either find an exception to the rule and be accused of “judicial activism” or enforce the rule and reach a result that follows the letter of the law but that many would consider fundamentally unfair.

The concern about unrecountable precincts is hardly theoretical. For instance, the November 2009 Detroit mayoral election was marred by broken security seals that caused approximately 50,000 ballots to be legally unrecountable, and resulted in a candidate request that the attorney general investigate whether fraud



had occurred.<sup>21</sup> The November 2008 election in Allegan County led to a recount in a county judicial race in which ballots in 25 out of 48 precincts could not be recounted because of lax chain of custody procedures.<sup>22</sup> The inability to recount more than half the precincts, in a race in which the margin of victory was only 255 votes out of approximately 43,000 cast, is deeply concerning. In 2007, failure to follow security procedures rendered unrecountable approximately 1/3 of all ballots cast in a race for Lansing city council.<sup>23</sup> Similar problems occurred in Saginaw Township,<sup>24</sup> Polkton Township,<sup>25</sup> and the city of Zeeland in 2006.<sup>26</sup> In the recounts following the fraud-tarnished 2005 Detroit city election, 88 out of 720 precincts, or approximately 12% of precincts, were not recountable.<sup>27</sup>

## **DETROIT**

Our original study identified serious problems in Detroit's 2005 primary and general elections, including a variety of absentee ballot improprieties.<sup>28</sup> As we described there, the elected city clerk, Jackie Currie, sent teams of government-paid "ambassadors" to assist voters casting absentee ballots in the primary election, but some of these ambassadors were found attempting to influence those they were assisting. In addition, Currie later admitted to the press that her office had sent out some absentee ballots pre-marked with votes for herself, city councilman Kwame Kenyatta, and former mayor Kwame Kilpatrick (who years later resigned in the face of unrelated ethics charges).<sup>29</sup> Security seals on some of the boxes containing cast absentee ballots were broken, suggesting further impropriety. In response to these problems, a court appointed overseers for the November general election and, when those overseers reported that Currie continued to engage in illegal activity, the court

ordered the extraordinary remedy of having the county clerk take over Currie's absentee ballot responsibilities. The election ended with a newly elected clerk, Janice Winfrey, having ousted Currie. Disturbingly, the FBI investigated Currie's management of the election for almost three years, then concluded the investigation without taking any action except to say that the state attorney general should have investigated it.<sup>30</sup>

Was that the end of problems in Detroit? Many knowledgeable observers around the state approve of Winfrey's performance and describe the situation as much improved. The new clerk has run all but one of her elections without notable glitches and was reelected with the endorsement of most Detroit-area newspapers.<sup>31</sup> News accounts concerning her performance report that she has made important improvements by removing the names of some 128,000 ineligible voters from the rolls, reporting election results faster (which reduces opportunities for "cooking" election results), and modernizing the office by digitizing records.<sup>32</sup> Winfrey also eliminated the controversial ambassador program, put greater controls over third-party delivery of ballots, enhanced requirements concerning the return of voting machine memory cards after the election, and mandated uniforms and fifteen hours of training for all poll workers.<sup>33</sup> We therefore agree that election administration in Detroit has improved significantly.

Nevertheless, a new city clerk alone may not resolve all of Detroit's underlying election administration problems. Deeper, systemic issues perhaps remain, as most recently suggested by the security problems, described above, that rendered approximately 50,000 ballots unrecountable in the November 2009 election.<sup>34</sup> Our continuing study of both the



theory and practical application of election law in many jurisdictions over many elections has repeatedly shown how the political culture of an area can be more important than the law on the books in determining how well elections are run. Unfortunately, Detroit has seen a repeated pattern of disregard for election laws, from Jackie Currie to former mayor Kwame Kilpatrick and former city council President Monica Conyers.<sup>35</sup> This pattern may reflect an underlying tolerance within the city's political culture for some degree of abuse of the election administration process. We therefore remain cautious about the extent to which the current city clerk's successes reflect a permanent solution to the city's history of corruption.

## ADMINISTRATIVE REFORMS

As we described in our original study, Michigan has long been a leader in election administration. It pioneered the concept that became known as motor voter registration, and later created one of the nation's first statewide voter registration databases. In the past several years, however, legislative deadlock has stymied the efforts of election administrators to continue to improve the system. Unsuccessful reform efforts have included proposals to (1) allow no-excuse absentee voting, (2) prohibit candidates from collecting completed absentee ballot applications, (3) require ID when submitting an absentee ballot, (4) allow absentee ballot submission by fax and email, (5) permit clerks to send absentee ballot applications by mail to every voter, (6) "pre-register" sixteen-year-olds to vote, (7) expand registration for college students who are away from home by allowing them to register with any clerk, rather than requiring them to return to their voting jurisdiction to register, and (8) increase the amount of time that absentee ballots are available for request by overseas

and military voters, and to allow these ballots to be transmitted to the voters via email. While many of these proposals made it through the Michigan House of Representatives, all of them except the last died in the Senate.

With the failure of the legislative reform efforts, election officials are looking for purely administrative ways to improve the system. For instance, the Bureau of Elections has explored whether Michigan could implement early voting without further amendments to state statutes. For decades, Michigan statutes have authorized absentee voters to cast their ballots early if they do so in-person and on a "voting machine."<sup>36</sup> Although the statutes do not define the phrase "voting machine," some have construed the wording to contemplate the old lever-type voting machines.<sup>37</sup> When Michigan moved to an all optical scan system in 2004, election officials conservatively decided to treat optical scanners as not "voting machines," and therefore to discontinue early voting. Now that early voting is becoming a nationwide trend, however, officials have reconsidered whether their initial interpretation was textually required, and have contemplated resuming an early voting program within existing law.

Statutory interpretation, however, is not the only barrier to Michigan achieving a true early voting program. Like Wisconsin (but unlike Illinois, Ohio and Minnesota, which give primary authority over elections to county-level officials), Michigan gives primary authority over elections to municipal-level officials. While this has its advantages, one disadvantage is that many municipal-level clerks work part-time on their own, with no employees to help them. Some of them also work out of their homes. These officials cannot reasonably be expected to allow voters into their homes for early voting in the days leading up to Election

Day, when they are already busy. For that reason early voting may not work as smoothly in Michigan as in states with greater election centralization. The Bureau of Elections has considered using Illinois-type vote centers as a way to eliminate this problem, but because of the tight state budget and general lack of legislative enthusiasm for reform, it could be some time before Michigan begins to offer universal early voting.

In addition to considering early voting, the Michigan Secretary of State created a “modernization committee” to look for other non-legislative ways to improve elections. Among other initiatives, the committee worked with the Bureau of Elections to bring electronic poll books into polling places. The committee developed software that is compatible with ordinary laptop computers and can be combined with bar code scanners or magnetic strip scanners to check in voters electronically at the polls. In a voluntary pilot program in 2010, the new electronic poll books were in use in more than one third of Michigan’s precincts, providing speedier operations and greater accuracy. By 2012, Michigan expects at least 60% of precincts will be using electronic poll books.<sup>38</sup>

The modernization committee also has made recommendations to clerks regarding the number of voting machines that are necessary in each polling place, and has developed other ideas to increase voting efficiency, including having poll workers greet voters immediately upon arrival at the polling place in order to determine whether they are in the correct location. The committee is implementing faster and cheaper routines for testing the accuracy of voting machines prior to each election, and has showed clerks how to save money on ballot printing costs by moving to a

system in which absentee ballots are identical to the ballots used in the polling place. The committee also is studying how best to conduct post-election audits, and developing a tracking system for absentee ballots that will help ensure that proper security and chain of custody rules are followed. It is looking into how no-excuse absentee voting might be implemented and whether officials in one municipality may be deputized to register college students who are away from their true residence to allow those students to cast absentee ballots in the municipality of their true residence.<sup>39</sup> The committee is also generally developing best practice guidelines for local clerks, as well as recommending that certain historical practices that have become duplicative or anachronistic be discontinued.

## REFERENCES

<sup>1</sup> Only 2,478 “envelope ballots”—Michigan’s version of provisional ballots that are not counted on election night but only later, after further examination—were cast in the November 2008 election. See State of Michigan: Department of State, *County Provisional Ballot Report November 4, 2008 General Election* (2008), available at [www.michigan.gov/documents/sos/Prov\\_Bal\\_Rpt\\_Co\\_Nov\\_08\\_278920\\_7.pdf](http://www.michigan.gov/documents/sos/Prov_Bal_Rpt_Co_Nov_08_278920_7.pdf).

<sup>2</sup> Michigan law stipulates that a cross or check mark before a candidate’s name is required to constitute a vote for that candidate. MICH. COMP. LAWS ANN. § 168.737 (West 2011). This definition is completed by a short list of types of crosses or check marks that do not count. § 168.803. The Michigan Secretary of State has also issued detailed instructions for determining whether a particular mark constitutes a vote, complete with images as examples. See State of Michigan: Department of State, *Determining the Validity of Optical Scan Ballot Markings* (2004), available at [http://www.michigan.gov/documents/OptScan\\_Validity\\_165397\\_7.pdf](http://www.michigan.gov/documents/OptScan_Validity_165397_7.pdf).

<sup>3</sup> See STEVEN F. HUEFNER, ET AL., FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 101-02 (2007).

<sup>4</sup> Among Michigan’s most populous jurisdictions, Grand Rapids, Sterling Heights, Flint, and Ann Arbor have appointed administrators. See *Michigan: Local Administrator’s Party Affiliation*, ELECTION LAW @ MORITZ, <http://moritzlaw.osu.edu/electionlaw/projects/maps2008/info.php?ID=49&state=43>. The administrators in Detroit, Warren, Lansing, Livonia, Dearborn, and Westland are elected.

<sup>5</sup> The initial count is performed by teams of poll workers from both parties, although the actual results are certified by municipal boards of canvassers that are not necessarily bipartisan in nature. MICH. COMP. LAWS ANN. § 168.674 (West 2011); 168.821; 168.24(a); 168.25. Recounts are overseen by a Board of State Canvassers that is split evenly between both major political parties. § 168.842.

<sup>6</sup> Michigan statutes do not authorize election contests *per se*, but do authorize proceedings in *quo warranto* (“by what warrant?”), which are functionally similar. MICH. COMP. LAWS ANN. § 600.4505 (West 2011). Many states that do authorize election contests authorize *quo warranto* proceedings, which are broader than election contests and can, for example, be used to remove a duly elected officeholder from office under some circumstances.

<sup>7</sup> MICH. RULES MCR 3.306 (West 2011); MICH. COMP. LAWS ANN. § 168.409(e) (West 2011).

<sup>8</sup> Ted Roelofs, *State High Court Ranks Low*, GRAND RAPIDS PRESS, June 18, 2008, at B3; Stephen J. Choi, Mitu Gulati, & Eric A. Posner, *Which States Have the Best (and Worst) High Courts?* (2008), available at [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2803&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2803&context=faculty_scholarship). The study drew upon data collected between 1998 and 2000.

<sup>9</sup> Adam Liptak, *Unfettered Debate Takes Unflattering Turn in Michigan Supreme Court*, N.Y. TIMES, Jan. 19, 2007, at 21.

<sup>10</sup> According to information provided by the Michigan Secretary of State’s office, 861,305 absentee ballots were cast in November of 2004, while 1,254,796 were cast in 2008. (Email from Bradley Wittman, Michigan Secretary of State’s Office, Sept. 14, 2009.)

<sup>11</sup> *Ballots Tainted?*, THE DETROIT NEWS, Oct. 30, 2005, at A1.

<sup>12</sup> *St. Joseph v. City of St. Joseph*, 127 N.W.2d 858, 861 (Mich. 1964).

<sup>13</sup> *Attorney General ex rel. Miller v. Miller*, 253 N.W. 241, 248-249 (Mich. 1934).

<sup>14</sup> *Gracey v. Grosse Pointe Farms Clerk*, 452 N.W.2d 471 (Mich. Ct. App. 1989).

<sup>15</sup> See Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 282-83 (2007).

<sup>16</sup> A thorough search of Westlaw’s most comprehensive Michigan news database, Michigan News, turned up only a few stories with titles referencing former Detroit city clerk Jackie Currie’s flawed management of the city’s 2005 municipal primary. They are: Marisol Bello, *Voting Project Ballots Sealed*, DETROIT FREE PRESS, Nov. 7, 2005, at B1; Editorial, *Only Recount Will Settle Mayoral Election*, DETROIT NEWS, Nov. 23, 2005, at A16; *Absentee Ballots Tainted?*, THE DETROIT NEWS, Oct. 30, 2005, at A1.

<sup>17</sup> See, e.g., Ryan J. Foley, *195 Felons May Have Cast Ballots*, WISCONSIN STATE JOURNAL, Oct. 1, 2009, at A5; Heather J. Carlson, *Three Charged With Illegally Voting in 2008, Another Charge Expected*, ROCHESTER POST-BULLETIN (Minn.), Sept. 30, 2010, available at Westlaw, 2010 WLNR 19444981.

<sup>18</sup> *St. Joseph v. City of St. Joseph*, 127 N.W.2d 858, 861 (Mich. 1964).

<sup>19</sup> MICH. COMP. LAWS ANN. § 168.871(c) (West 2011); *Ryan v. Montgomery*, 240 N.W.2d 236, 238 (Mich. 1976); see also *Poole v. Board of Canvassers of Wayne County*, 276 N.W.2d 587 (Mich. Ct. App. 1979); MICH. COMP. LAWS ANN. § 168.871 (West 2011), MICH. ADMIN. CODE r. 168.793; 168.907-168-

925(a) (2011) for “recountability” rules generally and with regard to voting machines, specifically.

<sup>20</sup> MICH. COMP. LAWS ANN. § 168.871 (West 2011).

<sup>21</sup> *Barrow Files Ballot Tampering Complaint*, THE DETROIT NEWS, Jan. 7, 2010, at A8.

<sup>22</sup> John Agar, *Allegan Recount Raises Questions*, GRAND RAPIDS PRESS, Dec. 6, 2008, at A3.

<sup>23</sup> Editorial, *Recount Woes*, LANSING STATE JOURNAL, Dec. 12, 2007, at A6.

<sup>24</sup> *Cammin Picks Up 4 Votes, Still Comes Up Short*, Saginaw News (Mich.), Dec. 14, 2006, at 5A.

<sup>25</sup> Jodi Burck, *Ballot snafus Will Lead to Changes*, GRAND RAPIDS PRESS, June 22, 2006, at 4.

<sup>26</sup> *Booze Backers Toast Victory*, GRAND RAPIDS PRESS, Dec. 6, 2006, at B1.

<sup>27</sup> Marisol Bello, *Recount Efforts in Michigan Don’t Always Add Up to Win*, DETROIT FREE PRESS, Dec. 9, 2005, at B3.

<sup>28</sup> See HUEFNER, *ET AL.*, *supra* note 3, at 96-97.

<sup>29</sup> Editorial, *That’s It For the Bogus Ballots?*, DETROIT FREE PRESS, July 17, 2008, at B1; *Cox Should Have Looked into ’05 Election FBI Says*, DETROIT FREE PRESS, July 19, 2008, at A3.

<sup>30</sup> *Id.*

<sup>31</sup> Opinion, *Detroit Clerk*, DETROIT FREE PRESS, Oct. 29, 2009, at A22; Editorial, *Keep Steady Hands*, THE DETROIT NEWS, July 26, 2009, at A31.

<sup>32</sup> *Id.*

<sup>33</sup> *Winfrey Overhauls Clerk’s Operations*, THE DETROIT NEWS, Nov. 12, 2009, at A9.

<sup>34</sup> *Barrow Files Ballot Tampering Complaint*, THE DETROIT NEWS, Jan. 7, 2010, at A8.

<sup>35</sup> *Conyers Urged to Resign, But Doesn’t Have to*, DETROIT FREE PRESS, June 27, 2009, at A7.

<sup>36</sup> MICH. COMP. LAWS ANN. § 168.769(a) (West 2011). The voting period begins 13 days before the election and ends the day before.

<sup>37</sup> For example, MICH. COMP. LAWS ANN. § 168.777 (West 2011) requires officials to create “a model representing a portion of the face of the machine and containing fictitious names....” This language is clearly referring to lever machines, which display the ballot on their face. The concept does not apply to optical scan equipment, except by analogy.

<sup>38</sup> Email from Timothy Hanson, Michigan Secretary of State’s Office, June 23, 2011.

<sup>39</sup> Michigan’s attorney general issued an “informal opinion” that stated this kind of cross-deputation is not permitted under existing law, but statutory changes could authorize the procedure. *Cox Disputes Shortcut to Aid First-Time Voters*, DETROIT FREE PRESS, Oct. 25, 2008, at A1.



## CHAPTER SIX: RECOMMENDATIONS AND CONCLUSIONS

THE PRIMARY RECOMMENDATION OF OUR ORIGINAL STUDY was for states to structure the institutional arrangements of their elections systems to combat partisan bias, both real and perceived, and to promote transparency and impartiality at all levels of election administration. This recommendation extends not only to the office of the chief election authority of every state, but also to the offices of local administrators, canvassing boards, provisional and absentee ballot counting operations, and to the tribunals set up to handle contested elections cases. We stand by this recommendation, believing it to be even more salient now than it was four years ago.

While we reaffirm the importance of independent electoral institutions, this follow-up study – informed as it is by the Coleman-Franken contest – makes a new recommendation: that post-election processes must be fair, unambiguous, and managed in a professional and organized way so as to ensure a swift and definitive conclusion. Minnesota’s experience confirms the importance of having electoral disputes resolved by institutions that are perceived to be, and that are in fact, free from partisan bias.<sup>1</sup> In addition, states need to closely examine their post-election processes to identify those that are out of date or governed by state statutes and case law only in insufficient detail. In performing this analysis, states can now study the the 2000 Florida presidential contest, the 2004 gubernatorial contest in Washington state, the 2008 Minnesota Senate contest, and 2010 post-election litigation in Ohio, to see what they can learn from the experiences of others. The hypothetical election contest scenarios that began each of the five state chapters of

this study are a beginning to such analysis, but can be taken further. Post-election cases have shown time and again that laws and procedures that may seem clear at first become less clear when they are tested by recounts and litigation, when multiple interpretations often present themselves. Furthermore, some of the governing laws are written in ways that can, strictly construed and under certain facts, lead to results that are manifestly unjust and almost certainly not intended when the rules were written. Rather than waiting for electoral disaster to strike, states need to think ahead and “war game” their systems against a broad range of potential scenarios.<sup>2</sup>

These recommendations, as well as some further recommendations concerning voter databases and convenience voting, are discussed below.

### INSTITUTIONAL ARRANGEMENTS

**1. States should structure election laws to check the partisanship of the administrative entities and should develop impartial electoral institutions, including a political culture, that promote fair partisan competition.**

This study draws the distinction between “hard” institutions, such as the administrative entities and procedures authorized by black-letter law, and “soft” institutions, such as a tradition of fair electoral competition residing among election administrators, candidates, or even the public at large. The best election system has high-quality institutions in both categories, allowing cooperative players to work together within well-defined, thoughtful procedures to reach results that are quick, transparent, and

fair. Other election systems may have high-quality hard institutions but suffer from a political culture that does everything it can to circumvent those institutions or treat them as nothing more than systems to be gamed. A third category of election systems might have poorly designed laws but nevertheless overcome that disadvantage because of a high degree of public-spiritedness in its administration and the outside public.

The power of soft institutions should not be underestimated. As discussed in the Minnesota chapter, at first glance an objective observer might have thought Minnesota had only a middling chance of concluding the Coleman-Franken contest as well as it did. The Minnesota Secretary of State is an elected partisan, the State Canvassing Board was appointed by the Secretary with no formal check on partisan affiliations, the three-judge election contest court was appointed by the state Supreme Court with no constraints as to its partisan composition, and the Minnesota Supreme Court is itself an elected body that may be as partisan as the voting public allows. However, because of its healthy political culture, Minnesota did not need strong formal checks on partisanship to prevent its election officials from indulging in partisan games.

But soft institutions are slow to develop, and states looking for an immediate benefit will have to turn to hard institutions for support. Policymakers need to analyze every aspect of the elections process, as well as each legal entity participating in it, and ask themselves at every point, “Is there a way to improve the impartial fairness of the electoral competition and add transparency to this process?” We think Wisconsin set a good example here by making some improvements in its thoughtfully planned chief elections board, and Illinois

long ago moved to a bipartisan board. On the other hand, Ohio seems to have invited trouble by choosing to have as its chief election officer an elected Secretary of State of openly declared political party affiliation. Minnesota and Michigan, two other states with elected Secretaries of State, have not experienced the same degree of politicization of the elections process that Ohio has experienced, but if they want to continue to enjoy that privilege they should consider whether a board structured along the Wisconsin model might better protect their elections system from politicization.

Policymakers also need to analyze the court system. The courts involved in any election contest must be not only competent and trustworthy but also *perceived* to be competent and trustworthy. As observed above, the Minnesota trial court and Supreme Court achieved this,<sup>3</sup> and without any formal checks on partisanship. However, if the political culture in Minnesota deteriorates and the state becomes sharply polarized in the way that other states (and national politics), are then there is a risk that in a future Minnesota election contest, the Chief Justice of the Minnesota Supreme Court could try to appoint the statutory 3-member contest court with judges who favored one candidate over another.

We believe a better model can be found in Minnesota’s past.<sup>4</sup> In its disputed 1962 gubernatorial election, the candidates by voluntary agreement through the court invented their own procedure, a 3-member panel in which each candidate chose one member and then those two members worked together to choose a third who was agreeable to both and therefore presumably fair. But that sensible approach has not been repeated, and we are aware of no state in which such a procedure is prescribed by law.<sup>5</sup>



Other institutions that need to be analyzed in this way include, but are not limited to, polling place staff, the offices of local administrators, canvassing boards, provisional and absentee ballot counting operations, and others.

## **POST-ELECTION PROCESSES**

### **2. Each state must guarantee all candidates reasonable access to recounts and election contest proceedings.**

While the need for full recounts and election contests may seem obvious, neither Illinois nor Ohio appears to allow election contests for federal candidates. In Illinois, this limitation derives from case law that strictly interprets the state election contest statutes to exclude federal contests, because they are not explicitly authorized.<sup>6</sup> In Ohio, a state statute passed in 2006 explicitly denies state courts jurisdiction over Presidential and other federal election contests.<sup>7</sup>

A similar situation applies to recounts. Illinois does not permit full recounts except with approval of the election contest court, yet candidates for federal office are not permitted to file these contests. Even candidates for state office cannot obtain a full recount without court permission, something that is often denied. Michigan, in contrast, generally allows full recounts except where post-election ballot security measures have not been followed. Unfortunately, this sometimes results in only partial recounts, and may actually give bad actors an incentive to deliberately violate security measures in order to prevent recounts in desired precincts.

It is hard to identify a good policy reason that would justify prohibiting these recounts and contests. The U.S. Constitution does provide

that the ultimate decision on whom to admit into the House and Senate rests with the members of those bodies, so perhaps the idea is that the recount officials and the courts should avoid getting involved and just leave things to Congress. However, this ignores the fact that, left to its own devices, Congress is not well-positioned to discover the facts of the election, especially in modern times when determining the true winner requires not only counting of physical ballots but also interacting with complicated technology that most legislators simply are not equipped to comprehend without assistance. Since it is not a court, the legislature cannot provide any authoritative interpretation of the election laws, especially state election laws it had no hand in drafting.

More importantly, leaving the resolution of federal election disputes to Congress undermines the effort to ensure the legitimacy of the election: the winner of an election should be determined in a fair, nonpartisan way, free from political considerations. Depriving Congress of a full judicial contest of an election to guide them in making their decision leaves the whole process in the realm of pure politics and greatly increases the risk that the ultimate result will be viewed as illegitimate.

### **3. Adopt a clear state law that tells courts exactly what to do when confronted with the commingled ballots dilemma.**

Throughout this book, we have examined the difficult situation sometimes facing election contest courts when ballots that were not eligible to be counted have nevertheless made it into the count and can no longer be identified and removed. Courts have taken many different approaches to this situation, including randomly throwing out some ballots, throwing out all ballots in the affected precincts,

taking testimony from unlawful voters to try to determine how they cast their ballots and adjusting vote totals accordingly, and ordering a new election. Prior to *Coleman v. Franken* itself, which presented this problem acutely, the highest profile case involving commingled ballots was the 2004 Washington gubernatorial election, in which the election contest court determined that 1,678 unlawful ballots had been counted.<sup>8</sup> For a remedy the court simply chose to do nothing, however, because there was no practicable way of determining whether or how those ballots had affected the outcome.

As the Washington experience suggested, commingled ballots present a situation for which there is no satisfactory remedy. The true result usually is unknowable, and for that reason it is difficult to say that any one of the approaches outlined above is better than the others. The lack of any clear solution may leave the election contest court to choose any approach it desires from among various bad solutions, perhaps one that will install its preferred candidate into office. In *Coleman v. Franken*, the Minnesota judiciary chose to handle this problem by invoking a waiver doctrine that prevented consideration of the issue on its merits. (The waiver doctrine, however, was of questionable applicability, as the Minnesota Supreme Court itself acknowledged in a footnote, because the challenge to the commingled absentee ballots was deemed waived even though Coleman actually had never had a chance to challenge the absentee ballots before commingling.<sup>9</sup>)

In the future, the legislature should spell out clearly what should happen when there is a dispute over the eligibility of commingled ballots, including the circumstances in which a waiver doctrine appropriately applies. In our judgment, there is merit to the notion that a candidate should not be permitted to

challenge the validity of commingled ballots if that candidate had an adequate opportunity to challenge them before commingling. We are more dubious, however, about the invocation of a waiver doctrine when the candidate had no opportunity to challenge the ballots in the first place (and we do not think that the legislature would want a candidate to have no opportunity whatsoever to challenge ballots believed ineligible under state law—for example, absentee ballots cast by unregistered voters). In any event, whatever position a court ultimately adopts with respect to the thorny problem of ineligible but commingled ballots, it is far preferable if that position merely implements an explicit statutory directive on the point, rather than being an exercise of judicial discretion.

#### **4. Ensure state statutes create a clear division of labor between recount officials and the courts.**

The 2008 Minnesota contest exposed considerable confusion on the part of election officials and the courts about whether and under what circumstances the State Canvassing Board could, as part of the recount, reconsider decisions made on election night to discount certain absentee ballots. This is one area where, again, the election code seemed clear enough in the abstract, but when confronted with unanticipated facts, decisions were not so easy. Although this problem did not undermine the legitimacy of the final outcome in Minnesota, it did contribute to the excessive delay of that outcome (eight months after voting was over). Moreover, under different circumstances, or in a different state, this lack of clarity could inject serious problems into the post-election process.

Of our five states, Wisconsin is of particular concern. It has an unusual election contest procedure in which the county board of canvassers, serving as the recount authority, effectively functions as the initial election contest court, before the contest moves to a regular court as an appeal of the recount. This could invite candidates to file mandamus actions or other lawsuits in the regular courts as a backdoor way to try to control the outcome of the recount phase of the election contest. A turf war of this kind would cause great disruption in the proceedings and lead to conflicting orders and general confusion.

Similar jurisdictional battles could occur in Illinois and Ohio, given existing law in each state that deprives state courts of jurisdiction over election contests for federal offices. Though in theory these laws might appear to leave the resolution of federal elections entirely to Congress or the federal courts, our fear is that they could complicate the picture as litigants seek alternative grounds for state court involvement in election outcomes. (Ohio has already seen forum-shopping in disputes over provisional ballots in both 2008 and 2010, with Democrats running to federal court hoping for a favorable result, while Republicans ran to the Ohio Supreme Court. In 2008, the Republicans prevailed, with the Ohio Supreme Court having the last word, but not so in 2010. There is a risk of continued jurisdictional turf-fighting and confusion, with its concomitant delays, in 2012.)

Illinois also might suffer some confusion or mismanagement in a statewide election because of another feature: the election contest court, at its discretion, can essentially outsource the taking of testimony, hearing of evidence, and other traditional judicial tasks to the State Board of Elections.<sup>10</sup> If properly

used, this power might aid, rather than impair, proper judicial resolution of the dispute, but if used poorly it might lead to the same kind of confusion and blurring of functions that we fear in Wisconsin.

There are no such obvious “blurring” problems in Ohio and Michigan, but that does not mean that a future election contest in those states would not expose significant ambiguities or other problems in defining the scope of recounts compared to the scope of election contests. In general, candidates who expect (or need) to make gains in the recount have an incentive to try to expand the scope of the recount to make it as broad as possible. Furthermore, by expanding the scope of questions that may be considered in a recount, a contestant can potentially get two bites at the apple—a chance to win the issue at the recount level, and then again in the election contest. Thus Al Franken, initially behind in the 2008 Minnesota contest, pushed to have previously rejected absentee ballots reconsidered during the recount, and got his way with respect to some, though not all, of those ballots. If he had lost on any of these ballots, nothing was sacrificed because he could make the same arguments again in the subsequent election contest. Norm Coleman, on the other hand, initially tried to limit the scope of the recount so that it did not include reconsidering whether individual absentee ballots had been properly rejected. Rather than having candidates argue over the scope of such proceedings, the legislature should step in and explicitly define the exact scope of each procedure and what types of considerations may or may not be part of each of them.<sup>11</sup>

**5. Administrators should try to anticipate very close contests, and take special care in close contests for statewide and other high-profile races.**

The Minnesota Secretary of State and some other Minnesota elections officials pointed out during our interviews with them that part of the reason why the 2008 recount and contest went so smoothly was that they believed from the beginning that the Senate race could easily require a recount, and so they were prepared for that possibility. Partly because of a statewide recount in the 2008 primary (over a judicial seat), they had created special online training tools, including video tutorials on various recount procedures, and had them updated and easily available to all county clerks to prepare them for the Senate recount.

Trying to anticipate close races is a good practice. Obviously, all elections are important and deserve adequate attention, but when margins are expected to be close the significance of each part of the process is magnified. Tiny errors and inconsistencies, even when they do not affect the true result of an election, can consume months and months of time. These errors and inconsistencies also generate bad public relations for the elections system, and might undermine faith in it or give ammunition to those who want to undermine faith in it.

**6. Each state should have a “finality plan” or set of laws designed to conclude elections disputes by a firm deadline, or otherwise install a provisional winner.**

Despite its general excellence, the 2008 Minnesota contest failed to conclude within a reasonable time, leaving Minnesota underrepresented in the Senate for a full six months. Some of that lost time was inevitable,

but the process could have gone faster without sacrificing fairness and accuracy. In the alternative, if Minnesota had allowed issuance of a provisional certificate of election while the contest proceeded, then Minnesota would at least have had an interim Senator in Washington looking out for the state’s interests.

As Table Eight below shows, none of our five Midwestern states have a firm deadline by which election contests must be completed. This suggests that post-election litigation in all five states could drag on and on for months, as is common in most types of litigation. Fortunately, outside of Minnesota, the other four states in our study all issue an official certificate of election to the apparent winner of each race even if an election contest is subsequently filed. While this may incorrectly presume the election contest is not going to be successful, it does ensure that these states have full representation while election contests are resolved. Still, speedy resolution of any ongoing election contest remains important, in case the preliminarily certified winner is later found not to have won. Furthermore, allowing someone other than the true winner to stay in office for too long conveys upon them an unearned aura of legitimacy that can be unfairly used to suggest the election contestant is a “sore loser” who cannot accept the people’s will.

For these reasons, legislatures in each state need to require election contest courts to conclude election contests by a firm deadline. The mandatory deadline can be different depending on the state and the type of office at stake, but there needs to be a deadline. It may even be that the requirement could include an exception for the court to extend the deadline in unusual circumstances. In legislative or judicial races, the legislature might decide speedy resolution is less important and the deadline

can be later, while most executive offices would be important to resolve as quickly as possible. It would be very difficult for the business of the state to proceed without a governor or other important executive officer. Likewise, it would be highly undesirable if a candidate came temporarily into a governorship, pushed through a sweeping set of reforms, and then was revealed not to have been the true winner.<sup>50</sup>

## **7. Post-election litigation will continue to focus on absentee and provisional ballots.**

Post-election litigation in Minnesota and Ohio has shown that absentee and provisional ballots are the “low-hanging fruit,” where contestants can expect to find the easiest gains. This is not only because the absentee and provisional ballot processes are more complex than traditional polling-place voting and therefore more prone to error, but also because these processes are much better documented. That documentation makes proving a case for or against a particular absentee ballot much easier than trying to prove a case for or against a traditional ballot that has no paperwork associated with it except the voter’s signature at the polls.

One area of both absentee and provisional balloting that may be ripe for litigation is how to determine whether elections workers, rather than voters themselves, are responsible for irregularities in ballot paperwork and, if so, how that affects the validity of the ballot. In Ohio, this problem surfaced in the provisional ballot litigation when Secretary Brunner ordered Ohio counties to construe certain types of paperwork irregularities as poll worker error, and for that reason to overlook those irregularities and count ballots that otherwise might not have counted. The Ohio Supreme Court halted that directive by concluding that there was no specific evidence that the

irregularities were poll worker error and forbade local election officials from presuming poll worker error in the absence of better evidence. In a more recent case flowing from the 2010 election, the Ohio Supreme Court held that provisional ballots cast in the wrong precinct cannot be counted, even when it was poll worker error that caused them to be cast in the wrong precinct.<sup>51</sup> It is unclear whether this holding would apply to provisional ballots that were cast in the proper precinct but suffered from other flaws attributable to poll worker error. In yet another case—and one that is ongoing—the Sixth Circuit held that, for purposes of considering a preliminary injunction motion, a county board of elections likely violated *Bush v. Gore*-style equal protection rights by considering evidence of poll worker error in determining whether to count certain provisional ballots, but not others that were cast under similar though slightly different circumstances.<sup>52</sup>

A similar problem occurred in Minnesota regarding several categories of absentee ballots that had initially been rejected by election officials, but were reconsidered during the election contest. For example, under Minnesota law voters are required to provide a valid signature on their absentee ballot return paperwork for the ballot count. Unfortunately, officials in one county, as part of an internal administrative measure, had placed stickers on the return paperwork that inadvertently covered up the blank where the voter’s signature was supposed to go. The election contest court suggested this clear official error could not excuse voters who had not supplied their signatures: “A sticker placed on an absentee ballot return envelope does not excuse the voter from complying with the law and signing the envelope.”<sup>53</sup> (The Minnesota Supreme Court, however, seemed to take the

**TABLE EIGHT: POST-ELECTION TIMELINES ACROSS THE FIVE STATES**

	<b>Minnesota</b>	<b>Ohio</b>	<b>Wisconsin</b>	<b>Michigan</b>	<b>Illinois</b>
County canvassing begin	On or before 7 <sup>th</sup> day after election. <sup>12</sup>	15 <sup>th</sup> day after the election. <sup>13</sup>	Thursday after the election. <sup>14</sup>	The day after the election. <sup>15</sup>	Within 21 days of the election. <sup>16</sup>
County canvassing end	Upon completion of the canvass. <sup>17</sup>	21 <sup>st</sup> day after the election, or earlier. <sup>18</sup>	14 days after election. <sup>19</sup>	14 days after election. <sup>20</sup>	Upon completion. <sup>21</sup>
State canvassing begin	3 <sup>rd</sup> Tuesday after election. <sup>22</sup>	Not later than 10 days after receipt of county returns. <sup>23</sup>	None stated. <sup>24</sup>	20 <sup>th</sup> day after the election, at the latest. <sup>25</sup>	Within 31 days of the election. <sup>26</sup>
State certification date	Seven days after canvas result, unless recount or contest occurs. <sup>27</sup>	Not later than 10 days after receipt of county returns, or at conclusion of any recount. <sup>28</sup>	1 <sup>st</sup> day of December. <sup>29</sup>	40 <sup>th</sup> day after the election. <sup>30</sup>	Upon completion.
Recount filing deadline	Seven days after certification. <sup>31</sup>	Five days after announcement of results. <sup>32</sup>	3 <sup>rd</sup> business day following receipt of all county-level returns. <sup>33</sup>	2 days after state certification. <sup>34</sup>	Five days after certification. <sup>35*</sup>
Recount certification date	None stated. <sup>36</sup>	None stated. <sup>37</sup>	1 <sup>st</sup> day of December. <sup>38</sup>	None stated.	None stated.*
Contest filing deadline	Seven days after canvass/recount. <sup>39</sup>	15 days after announcement of result, or 10 days after recount result. <sup>40*</sup>	N/A <sup>41</sup>	30 days after the election. <sup>42</sup>	None stated <sup>43*</sup>
Contest completion deadline	None stated.	None stated, but trial begins 15 to 30 days after petition filing. <sup>44*</sup>	N/A	None stated.	None stated.*
Election contest court	Special 3-judge panel assigned by chief justice of Supreme Court. <sup>45</sup>	Chief Justice of Supreme Court or SC Justice appointed by chief. <sup>46*</sup>	Governmental Accountability Board <sup>47</sup>	Intermediate appellate court (elected). <sup>48</sup>	State Supreme Court (elected). <sup>49*</sup>

Note: The above information applies to U.S. Senate elections only. Different rules may apply in elections for state offices, federal offices that are not statewide, and Presidential elections.

\*As discussed in the Ohio and Illinois chapters, it is not clear that either of these states would permit election contests for U.S. Senate or any other federal office. Furthermore, Illinois does not permit full recounts except as part of an election contest.



opposite position on this issue from the trial court, although this difference did not matter in light of Coleman’s failure to introduce enough evidence to validate ballots affected with this kind of official error.<sup>54)</sup>

Other absentee and provisional ballot issues likely to be further explored in litigation, as discussed both in our original study and at length in the Ohio chapter above, include whether absentee ballots are sufficiently completed to count, the intersection of absentee balloting and HAVA ID and database “matching” issues, whether voters are being improperly asked to cast provisional ballots when they are eligible to cast regular ballots, and the details of the processes used to determine whether voters are registered and eligible and have met any other requirements necessary for their provisional ballots to count.

## DATABASES AND MATCHING

### **8. Each state should clarify the consequences of a HAVA non-match and specify precisely how mismatch data can be used.**

As discussed in the Ohio and Wisconsin chapters of this study, in 2008 both of those states faced litigation concerning how election officials match data on incoming voter registration applications against social security and state motor vehicle databases. These suits echoed similar suits in Washington<sup>55</sup> and Florida,<sup>56</sup> and together they provide important information about the matching issue. First, the decisions in all four suits suggest that HAVA does *not* require matching as a precondition to voter registration and that a failed match, in the absence of an explicit state law to the contrary, cannot alone be used as a basis to disenfranchise the voter.<sup>57</sup> On the other hand,

the decisions do suggest that officials must diligently perform these matching operations, to the extent necessary to verify accuracy,<sup>58</sup> and should share the results with other election officials in a way that allows officials to conduct further inquiry concerning mismatches.

The most important aspect of these suits, however, may be what they do *not* tell us. Specifically, they do not explain sufficiently what officials are supposed to do when confronted with a non-match. The Sixth Circuit, considering an appeal in the Ohio case, indicated that the Secretary of State must share non-match data with local officials in a way that is “usable,”<sup>59</sup> but gave no clues as to what consequences non-matches might have when they cannot be explained. One use that *is* required by HAVA is to use positive matches to relieve first-time voters of HAVA’s ID requirement: matched voters do not have to comply with this requirement. However, other uses for the data are possible, such as identifying data entry errors in the voter registration database. In the event that voter registration applications are submitted with incorrect information, non-match data can be, and often is, used to contact voters for corrections.

But the plaintiffs in the lawsuits had another use in mind for mismatch data: as evidence to attempt to disqualify at least some non-matched voters from the registered voter database altogether. No court has prohibited using a mismatch to trigger a chain of events that could eventually result in disenfranchisement of the voter. The Sixth Circuit, in particular, seemed somewhat open to the idea that a non-match could be used as a basis for launching an investigation into a voter’s qualifications that, in some undefined procedure, could result in the voter having to cast a provisional ballot.<sup>60</sup>



The plaintiffs in these suits might have hoped that, by combining the non-match data together with other indicia of problematic registrations, they could mount systemic challenges against certain voters. For instance, the non-match data could be cross-referenced against lists of sheriff’s sales, evictions, imprisoned felons, residents of group homes, or the voter registration databases of other states. In Michigan, it could be cross-referenced against existing databases that flag registrations tied to non-residential addresses. If sufficient resources were at hand, the process could even conclude with a physical canvass of a list of addresses believed to be problematic. By piling on layers and layers of data and focusing on only those registrations that seem the most problematic, it might be possible to use HAVA non-match data as one part of a challenge to the voter registrations of individual voters. For instance, a political party could launch a series of highly individuated challenges calculated to target only those voters who seem most likely to be disqualified. Because voters generally lose the challenges automatically if they do not appear at the challenge hearing, these challenges might be effective even when the voter was properly registered and eligible.

However, the data could be used not only to disenfranchise voters, but could also be used to enfranchise them. As noted, positive matches are required to relieve first-time voters of HAVA’s ID requirement. But in a state that

is not performing matches or is not sharing match data with local administrators in a way that is usable, local administrators have no way of knowing which first-time voters must provide this ID and could be requiring ID of every first-time voter in violation of federal law. States therefore may want to ensure that election administrators are aware of their duties to perform these matches and are not requiring ID of those who are exempt.

The matching issue is a very complex one, not only because it involves fragmentary state laws and “clumsy” HAVA language,<sup>61</sup> but also because it involves technology that is difficult to understand. Rather than waiting for this confusion to be resolved in a piecemeal way through a series of lawsuits, state legislatures need to step in and specify detailed rules that define the purpose of the matching program and the ways that the data may and may not be used.

**9. Each state should analyze its HAVA matching program in conjunction with its absentee balloting programs.**

HAVA matching also has important consequences for absentee balloting procedures. Under HAVA’s ID requirement, a non-matched voter needs to present a form of acceptable ID before voting, even if voting by absentee ballot. This means that a non-matched absentee voter must photocopy the voter’s driver’s license, utility

**TABLE NINE: CONSEQUENCES OF HAVA MISMATCHES ACROSS THE FIVE STATES**

State	Consequence of Mismatch
Illinois	None
Michigan	Voter must show ID at polls or cast provisional ballot
Minnesota	Voter not registered (but can cast a regular ballot using EDR)
Ohio	None
Wisconsin	None

bill, bank statement, paycheck, government check, or other government document showing name and address, and include this photocopy with the absentee ballot materials. However, the absentee ballot request forms and return envelopes used by voters might not give adequate instructions, or instruct voters at all, about whether they need to fulfill this requirement. As a result, some voters may fail to comply when they need to, while others may forego voting because they believe they need to present ID when they actually do not. Furthermore, in states where absentee ballots are sometimes submitted together with EDR registration applications,<sup>62</sup> such as Minnesota, the intersection of HAVA's ID rules, absentee balloting rules, and the special ID required for EDR lead to even greater complexity when analyzed in conjunction with the matching issue.

Although these issues only affect first-time voters and may seem quite small, the Ohio matching litigation suggests that a primary reason for the suit was to call into question Ohio's "Golden Week" of one-stop registration and in-person absentee voting. However, the same concern potentially applies not only to one-stop voting, but also to mail-in absentee voting and voting at the polls. A full analysis of these issues is outside the scope of this study, but needs to be conducted.

## **CONVENIENCE VOTING**

### **10. States should reexamine increasingly antiquated rules and practices that presume traditional in-person voting is the only option for most voters.**

The implications of the rise of absentee and early voting are significant. Mail-in absentee

voting can save money, ease lines at polls, spread voting over time, document the voting process better, and enhance voter convenience. But it also has downsides. For instance, mail-in balloting, unlike in-person balloting, does not give the user the benefit of new voting machines that check the ballot to make sure it has been filled out correctly. This lack of error correction could increase the percentage of over-votes in mail-in ballots. The risk of fraud and other impropriety also is elevated in absentee balloting, because votes are cast outside the secrecy of the voting place, opening the door for bad actors to intimidate voters or otherwise attempt to improperly influence their votes.

An additional problem is that mail-in absentee voting increases the number of ways that a voter's ballot can be invalidated. The voter not only must be registered properly, but also must submit a proper and timely ballot request, provide a matching signature, and return the completed ballot, together with some accompanying paperwork, in time for it to be counted. In the 2008 election, Ohio disregarded approximately 27,500 mostly mail-in absentee ballots,<sup>63</sup> approximately 1.6% of all absentee ballots cast statewide. The relative complexity of the absentee voting process not only means that more voters might be disenfranchised by minor irregularities in their paperwork, but also heightens the risk of litigation to clarify or control the way that complexity is interpreted by officials and the courts. The increase in documentation makes elections more "disputable" after the fact than they have been ever before.

The lack of any history of mail-in voting at the levels now being seen means that there is a dearth of case law interpreting mail-

in voting provisions and giving guidance to administrators and future courts. In Ohio and Minnesota, some of the ambiguities in the law have been resolved through recent litigation, but Illinois, Michigan, and Wisconsin have not had the benefit of learning from such conflicts.

The rise in mail-in voting may also mean that ballot counting practices need to change. Under the Minnesota law in place in 2008, some counties had mail-in ballots counted by poll workers in their precincts, while other counties counted mail-in ballots centrally by a board. Procedures differed between the two different systems in small but potentially significant ways. The increasing emphasis on procedural uniformity in matters of election administration makes it important to consider a centralized system for counting absentee ballots that gives administrators more control over the process.

The rise of in-person early voting has many of the advantages of mail-in absentee voting, with fewer drawbacks. In-person early voting still increases voter convenience, but it also gives voters access to poll workers who can help them and to voting machines that check to see whether their ballots are marked properly. Casting a ballot in person is also more secure, as there is little probability of interception, and there is less risk of violations to voter privacy in a controlled environment. Permitting early voting for all voters also takes stress off the regular mail-in absentee system and makes it less likely that voters will misrepresent their eligibility to cast a mail-in absentee ballot by saying they meet whatever qualifications might be required for mail-in voting. Unlike mail-in ballots, early voting ballots get commingled in the election-night count and face little risk they will be retroactively uncounted in subsequent

elections litigation. They therefore work to discourage post-election litigation, while mail-in balloting encourages it.

One unexpected implication of early voting, however, may be that the touchscreen machines that have recently become disfavored in some quarters may remain an important vote-casting option. That is because early voting often occurs not in precinct polling places but in voting centers that will service multiple precincts. This means that the voting center must be prepared to issue hundreds or even thousands of ballot styles to voters, which is more difficult using a paper ballot system. Touchscreen machines can be programmed to carry most of the ballot styles, thereby reducing the logistical challenges of this voting system.

We are troubled that legislative efforts concerning convenience voting since 2010 seem motivated, not by a desire to improve the electoral process from a perspective of evenhanded impartiality towards both major political parties, but instead by the desire of the political party temporarily in legislative power to adopt rules that would advantage its candidates in the next electoral cycle. While it would be naïve to find such partisan motivations surprising, it is nonetheless unfortunate. It fails to respect the distinction in a healthy democracy between legitimate partisan competition under the constraints of impartial rules, on the one hand, and inappropriate efforts to undermine the impartial rules that make the partisan competition fair.

\* \* \*

Throughout the United States, administering elections remains a complex, underfunded,

time-pressured responsibility for the thousands of election officials and countless additional Election Day volunteers. States should reduce the burdens on these dedicated personnel and decrease the pressure on their election ecosystems by developing greater clarity in how the key processes should be conducted, and by continuing to professionalize election administration duties. The 2008 Minnesota U.S. Senate race makes clear that even well-functioning systems are not immune from serious difficulties, and invites all states to reflect now on how to minimize comparable difficulties in their own elections.

Because lawmakers are *both* partisan candidates, who are entitled to be motivated by a partisan desire to win reelection, *and* public servants who are obligated to act impartially when adopting the rules for electoral competition, a healthy democracy breaks down when lawmakers let their partisan motives spill over into their actions for amending the rules for electoral competition. If lawmakers are unable to restrain their partisan motives in this respect, it becomes necessary to consider whether constitutional measures are necessary to impose new constraints concerning legislation that determines the rules of electoral competition. Although historically the laws that regulate what is commonly called “election administration”—what we call “from registration to recounts” regarding the casting and counting of ballots—have been thought to be the province of ordinary legislation, rather than constitutional law, recent experience suggests that this assumption may need reconsideration. It is too soon after 2010 for a definitive judgment on this point, but it is an issue to watch in the future.

## REFERENCES

<sup>1</sup> Both Jay Weiner's book, *This is Not Florida*, and the articles written by one author of this book (Edward Foley, *see infra* notes 9 and 11) make this point. For Foley's review of Weiner's book, see Edward B. Foley, *A Tale of Two Teams*, 10 ELECTION L. J. \_\_\_\_ (forthcoming 2011).

<sup>2</sup> For instance, in 2008 the *Election Law @ Moritz* program ran an election contest simulation in which a hypothetical court considered a prescribed set of facts hypothetically occurring in the 2008 Colorado Presidential race. For details, see *Election Court: McCain v. Obama*, ELECTION LAW @ MORITZ, <http://moritzlaw.osu.edu/electionlaw/projects/mccainvobama/index.php>; *see also* Edward B. Foley, *Democracy in the United States, 2020 and Beyond*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS 209-225 (Cambridge U. Press 2011) (Gerken, Charles & Kang, eds.) (recommending additional "war gaming" of election contest scenarios).

<sup>3</sup> The Minnesota Supreme Court achieved this belatedly in its unanimous affirmance of the balanced three-judge trial court. Earlier in the process, the Minnesota Supreme Court had issued a decision with an ugly 3-2 split that appeared partisan. Recoiling from that unfortunate experience help assured that the rest of the Minnesota judiciary's decisions in the dispute would not suffer a similar taint.

<sup>4</sup> Along these lines, we have suggested in the past the creation of special election tribunals with an odd number of judges: two or more from each party, who then together must unanimously choose the final member. *See* Edward B. Foley, *The McCain v. Obama Simulation: A Fair Tribunal for Disputed Presidential Elections*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 471 (2010); Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL'Y REV. 350 (2007); Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265 (2007). Other models might work as well.

<sup>5</sup> *What Court Would Hear a Presidential Contest?*, ELECTION LAW @ MORITZ, <http://moritzlaw.osu.edu/electionlaw/projects/maps2008/maps.php?ID=3>.

<sup>6</sup> *Young v. Mikva*, 363 N.E.2d 851, 852-53 (Ill. 1977).

<sup>7</sup> OHIO REV. CODE ANN. § 3515.08(A) (West 2011).

<sup>8</sup> *See Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. June 6, 2005), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/FinalJudgement-694.pdf>.

<sup>9</sup> For details, see Edward B. Foley, *Lake Wogebone Recount: Minnesota's Disputed 2008 U.S. Senate Election*, 10 ELECTION L.J. 129, \_\_\_\_ (forthcoming 2011).

<sup>10</sup> 10 ILL. COMP. STAT. ANN. 5/23-1.8(b) (West 2011).

<sup>11</sup> One author of this book, Edward Foley, has recently developed a set of procedural recommendations on how to conduct future recounts and resolve disputes over ballots in major statewide elections. *See* Edward B. Foley, *How to Make Fair Faster: The Lessons of Coleman v. Franken*, 10 ELECTION L.J. \_\_\_\_ (forthcoming 2011).

<sup>12</sup> MINN. STAT. ANN. § 204C.33 (West 2011).

<sup>13</sup> OHIO REV. CODE ANN. § 3505.30 (West 2011).

<sup>14</sup> WIS. STAT. ANN. § 7.60 (West 2011).

<sup>15</sup> MICH. COMP. LAWS ANN. § 168.821 (West 2011).

<sup>16</sup> 10 ILL. COMP. STAT. ANN. 5/22-1 (West 2011).

<sup>17</sup> MINN. STAT. ANN. § 204C.33 (West 2011).

<sup>18</sup> OHIO REV. CODE ANN. § 3505.32; 3505.33 (West 2011).

<sup>19</sup> WIS. STAT. ANN. § 7.60 (West 2011).

<sup>20</sup> MICH. COMP. LAWS ANN. § 168.822 (West 2011).

<sup>21</sup> 10 ILL. COMP. STAT. ANN. 5/22-1 (West 2011).

<sup>22</sup> MINN. STAT. ANN. § 203C.33 (West 2011).

<sup>23</sup> OHIO REV. CODE ANN. § 3505.35 (West 2011).

<sup>24</sup> WIS. STAT. ANN. § 7.70 (West 2011) states that the state may dispatch a courier to obtain county-level results on the 11<sup>th</sup> day after the election, but that is not necessarily the deadline.

<sup>25</sup> MICH. COMP. LAWS ANN. § 168.842 (West 2011).

<sup>26</sup> 10 ILL. COMP. STAT. ANN. 5/22-7 (West 2011).

<sup>27</sup> MINN. STAT. ANN. § 204C.40 (West 2011).

<sup>28</sup> OHIO REV. CODE ANN. § 3505.38 (West 2011).

<sup>29</sup> WIS. STAT. ANN. § 7.70 (West 2011).

<sup>30</sup> MICH. COMP. LAWS ANN. § 168.842 (West 2011).

<sup>31</sup> MINN. STAT. ANN. § 204C.35 (West 2011). However, note that the recount is automatic and occurs without a request if the margin of victory is less than 0.5% of the total number of votes.

<sup>32</sup> OHIO REV. CODE ANN. § 3515.02 (West 2011). However, note that Ohio law requires an automatic recount will occur whenever the result of a statewide election falls within a quarter of a percent. *Id.* at § 3515.011.

<sup>33</sup> WIS. STAT. ANN. § 9.01 (West 2011).

<sup>34</sup> MICH. COMP. LAWS ANN. § 168.880 (West 2011). However, note that, in the case of a statewide office, a recount will occur automatically if the margin of victory is fewer than 2,000 votes.

<sup>35</sup> 10 ILL. COMP. STAT. ANN. 5/22-9.1 (West 2011).

<sup>36</sup> *See* MINN. R. 8235.1100 (2011).

<sup>37</sup> There is no recount certification deadline stated for non-Presidential elections. However, the Board must certify a final canvass of the returns no later than eight-one days after the election. OHIO REV. CODE ANN. § 3515.32 (West 2011). This implies the recount should be completed by this deadline.

<sup>38</sup> WIS. STAT. ANN. § 9.01(5)(c) (West 2011).

<sup>39</sup> MINN. STAT. ANN. § 209.021 (West 2011).

<sup>40</sup> OHIO REV. CODE ANN. § 3515.09 (West 2011).

<sup>41</sup> Wisconsin does not have election contests *per se*, but allows contest-type proceedings to occur at the recount level. WIS. STAT. ANN. § 9.01 (West 2011).

<sup>42</sup> MICH. COMP. LAWS ANN. § 600.4545 (West 2011).

<sup>43</sup> *See* 10 ILL. COMP. STAT. ANN. 5/23-1.2(a) (West 2011). The filing deadline for state constitutional officers is 15 days after certification, but different deadlines apply to different types of offices. It is not clear whether election contests are even available to aggrieved candidates in Illinois and Ohio.

<sup>44</sup> OHIO REV. CODE ANN. § 3515.10 (West 2011). However, the court may set a new date not later than thirty days after the original date.

<sup>45</sup> MINN. STAT. ANN. § 209.045 (West 2011).

<sup>46</sup> OHIO REV. CODE ANN. § 3515.08 (West 2011) (assuming a contest for U.S. Senate would be allowed at all, but Ohio law specifically excludes federal election races from the election contest statute).

<sup>47</sup> WIS. STAT. ANN. § 9.01 (West 2011).

<sup>48</sup> MICH. COMP. LAWS ANN. § 600.4505 (West 2011); *Stokes v. Clerk of Bd. of Canvassers of Monroe County*, 184 N.W.2d 746, 748 (Mich. Ct. App. 1970); MICH. RULES MCR 3.306 (West 2011). Court of appeals judges are elected. MICH. COMP. LAWS ANN. § 168.409(e) (West 2011).

<sup>49</sup> 10 ILL. COMP. STAT. ANN. 5/23-1.1(a) (West 2011).

<sup>50</sup> Foley's article *How to Make Fair Faster*, *see supra* note 11, is an initial effort at proposing reforms along these lines, to take greater account of the value of finality.

<sup>51</sup> *State ex rel. Painter v. Brunner*, 128 Ohio St.3d 17, 941 N.E.2d 782 (2011), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Painter-Opinion-1-7.pdf>.

<sup>52</sup> *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219 (6<sup>th</sup> Cir. 2011), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Hunter-6thOpinion.pdf>.

<sup>53</sup> *See* Order Following Hearing 14, *Coleman v. Franken*, No. 62-CV-09-56 (Minn. Dist. Ct. Feb. 12, 2009), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Orderon19categories.pdf>.

<sup>54</sup> For details on this point, see Edward B. Foley, *Lake Wobegone Recount*, *supra* note 9. One implication of this apparent difference between the two Minnesota courts, other than the possibility of further litigation to clarify the discrepancy, is the importance of an impartial tribunal to determine which rule to apply when legislature has not specified. *See* Foley, *How to Make Fair Faster*, *supra* note 11.

<sup>55</sup> *See Washington Association of Churches v. Reed*, No. 2:06-cv-00726-rsm (W.D. Wash. May 24, 2006), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/wac.php>.

<sup>56</sup> *See Florida State Conference of the NAACP v. Browning*, No. 07-15932 (11th Cir. Sept. 17, 2007), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/FloridaNAACPv.Browning.php>.



<sup>57</sup> See *Van Hollen v. Government Accountability Board*, No. 08 CV 4085 (Wis. Cir. Ct. Oct. 23, 2008), at 15, *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/VanHollen-Order-10-23-08.pdf> (“Nothing in state or federal law requires that there be a data match as a condition on the right to vote. Nor do they require that the voter show any proof of eligibility, essentially to reregister, in the event of a mismatch.”).

<sup>58</sup> See Nathan A. Cemenska, *HAVA’s Matching/ID Requirement: A Meaningless Tale Told by Congress*, 12 RICH. J.L. & PUB. INT. 27 (2008).

<sup>59</sup> *Ohio Republican Party v. Brunner*, 544 F.3d 711, 715 (6th Cir. 2008) (“A mismatch that she [Brunner] does not track down and that she does not allow the county boards of election meaningfully to track down is not a usable mismatch.”).

<sup>60</sup> “At most, the relief [sought by the Ohio Republican Party] could prompt an inquiry into the bona fides of an individual’s registration, and at most it could require an individual to cast a provisional ballot.” *Id.* at 717.

<sup>61</sup> *Florida State Conference of NAACP v. Browning*, 522 F.3d 1153, 1171 (11th Cir. 2008).

<sup>62</sup> MINN. STAT. ANN. § 203B.04(4) (West 2011).

<sup>63</sup> See *Absentee and Provisional Ballots Statistics for November 4, 2008 General Election* (2008), *available at* <http://www.sos.state.oh.us/sos/upload/elections/2008/gen/amendedgeneralcombined.pdf>.

## APPENDIX: INDIVIDUALS CONSULTED

As with our 2007 study, a number of individuals in each of the five studied states graciously shared their time and expertise with us as we continued to examine election administration in their states. Many of these were individuals with whom we had consulted in preparing the original study, whose willingness to speak with us again provided critical continuity and consistency as we assessed the changes that were occurring in their states. We also benefitted from the perspectives and assistance of many new individuals consulted specifically for this follow-up study. We are grateful to all of these people.

### ILLINOIS

**James P. Allen**, *Communications Director, Chicago Board of Election Commissioners*

**Jay Bennett, Jr.**, *Chief Deputy Clerk, Kane County*

**Cindi Canary**, *Director, Illinois Campaign for Political Reform*

**Cristina Cray**, *Legislative Liaison, State Board of Elections*

**John Cunningham**, *Clerk, Kane County*

**Lance Gough**, *Executive Director, Chicago Board of Election Commissioners*

**Daniel Madden**, *Legal Advisor, Cook County Clerk's Office*

**Peter McLennon**, *Policy Analyst, Cook County Clerk's Office*

**Mark Mossman**, *Director of Election Information, State Board of Elections*

**David Orr**, *Clerk, Cook County Clerk*

**Kyle Thomas**, *Database Coordinator, State Board of Elections*

### MICHIGAN

**Todd Blake**, *City Clerk, City of Freemont*

**Jocelyn Benson**, *Associate Professor of Law, Wayne State University, and candidate, Michigan Secretary of State, 2010*

**Patricia Donath**, *Special Projects Director, League of Women Voters of Michigan*

**Kathy Dornan**, *City Clerk, City of Farmington Hills*

**Jeff Hawkins**, *Deputy Clerk, Plainfield Township*

**Timothy Hanson**, *Director of Program Development, Bureau of Elections, Office of the Secretary of State*

**Evan Hope**, *Clerk, Delhi Township*

**Susan S. Kaltenbach**, *Clerk, Saginaw County*

**Dana L. Muscott**, *City Clerk, City of Bay City*

**Rich Robinson**, *Executive Director, Michigan Campaign Finance Network*

**Christopher M. Thomas**, *Director of Elections, Bureau of Elections, Office of the Secretary of State*

**Ann Ulrich**, *Clerk, Hartland Township*

**Bradley S. Wittman**, *Director, Elections Liaison Division, Bureau of Elections, Office of the Secretary of State*

## MINNESOTA

**Eric Black**, *Journalist, MinnPost.com*

**Mike Dean**, *Executive Director, Minnesota Common Cause*

**Jim Gelbmann**, *Deputy Secretary of State*

**Joseph Mansky**, *Elections Manager, Ramsey County*

**Patty O'Connor**, *Director of Taxpayer Services, Blue Earth County*

**Gary Poser**, *Director of Elections, Office of the Secretary of State*

**Cindi Reichert**, *Clerk, Anoka County*

**Mark Ritchie**, *Secretary of State*

**Rachel Smith**, *Program Director, Excellence in Election Administration, University of Minnesota*

**Rachel E. Stassen-Berger**, *Capitol Bureau Reporter, St. Paul Pioneer Press*

**Laura Wang**, *Interim Director, League of Women Voters of Minnesota*

**Jay Weiner**, *Journalist, MinnPost.com*

## OHIO

**Jennifer Brunner**, *Secretary of State*

**Bryan Clark**, *Policy Director, Office of the Secretary of State*

**Matthew Damschroeder**, *Deputy Director, Franklin County Board of Elections*

**David M. Farrell**, *Director of Elections, Office of the Secretary of State*

**Caroline Gentry**, *Partner, Porter Wright Morris & Arthur, LLP*

**Lawrence Norden**, *Deputy Director, Democracy Program, Brennan Center for Justice*

**Brian Shin**, *Chief Elections Counsel, Office of the Secretary of State*

**Michael Stinziano**, *Director, Franklin County Board of Elections*

**Katherine Thomsen**, *Field Representative, Office of the Secretary of State*

**Catherine Turcer**, *Director, Money in Politics Project, Ohio Citizen Action*

## **WISCONSIN**

**Neal V. Albrecht**, *Assistant Director, City of Milwaukee Election Commission*

**Jay Heck**, *Executive Director, Common Cause Wisconsin*

**Andrea Kaminski**, *Executive Director, League of Women Voters of Wisconsin*

**Kevin J. Kennedy**, *Executive Director, Government Accountability Board*

**Bruce Landgraf**, *Assistant District Attorney, Milwaukee County*

**Mike McCabe**, *Executive Director, Wisconsin Democracy Campaign*

**Robert Ohlsen**, *County Clerk, Dane County*

**Sandra L. Wesolowski**, *City Clerk, City of Franklin*



## ABOUT THE AUTHORS

**Steven F. Huefner**, *Professor of Law at The Ohio State University Moritz College of Law (“Moritz”), Election Law @ Moritz (“EL@M”) Senior Fellow, Director of the Moritz Legislation Clinic, and Moritz Clinical Programs Director*, has wide-ranging election law experience and interests, including the specific areas of contested elections, term limits in state legislative elections, military and overseas voting, nonprecinct voting, legislative redistricting, and poll worker responsibility and training. Prior to joining the faculty at Moritz, Professor Huefner spent five years in the Office of Senate Legal Counsel, U.S. Senate, where his responsibilities included advising the U.S. Senate in a contested Senate election, as well as assisting in the 1999 presidential impeachment trial. At Moritz, Professor Huefner teaches Legislation, Jurisprudence, Legal Writing, and the Legislation Clinic. For the past three years, he has served as the Reporter on a Uniform Law Commission project to develop the Uniform Military and Overseas Voters Act, or UMOVA, now being adopted in individual states. In addition to his work on FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES (2007), Professor Huefner’s previous election law scholarship includes: “What Can the United States Learn From Abroad about Resolving Disputed Elections?” (*N.Y.U. Journal of Law & Public Policy*); “Remedying Election Wrongs” (*Harvard Journal on Legislation*); *Don’t Just Make Redistricters More Accountable to the People, Make Them the People* (*Duke Journal of Constitutional Law & Public Policy*); and “Term Limits in State Legislative Elections: Less Value For More Money?” (*Indiana Law Journal*).

**Nathan A. Cemenska**, an attorney in private practice and a 2004 Moritz College of Law graduate, is also an election law consultant and former web editor of EL@M ([www.electionlaw.osu.edu](http://www.electionlaw.osu.edu)), an online legal publication dedicated to covering the law of election administration. Before his work with EL@M, he practiced general civil litigation at a Cleveland law firm. His election law scholarship includes his work on FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES (2007), and *HAVA’s Matching/ID Requirement: A Meaningless Tale Told by Congress* (*Richmond Journal of Law & Public Interest*).

**Daniel P. Tokaji**, *Professor of Law at Moritz and Senior Fellow of EL@M*, is an authority on election law and voting rights. He specializes in election reform, including voting technology, voter ID, provisional voting, and other subjects addressed by the Help America Vote Act of 2002. He also specializes in issues of fair representation, including redistricting and the Voting Rights Act of 1965. Professor Tokaji’s published work addresses questions of election administration, political equality, and racial justice. Among the publications in which his scholarship has appeared are the *Michigan Law Review*, *Stanford Law & Policy Review*, and *Yale Law Journal*. Professor Tokaji’s significant publications in the past three years include: “The Future of Election Reform: From Rules to Institutions” (*Yale Law & Policy Review*); “Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws” (*Indiana Law Review*); and “Voter Registration and Election Reform” (*William & Mary Bill of Rights Journal*). Professor Tokaji also is co-author (with Richard Hasen and Daniel Lowenstein) of one of the leading election law casebooks, and serves as co-editor-in-chief of the *Election Law Journal*, the premier professional journal devoted to election law scholarship. Media outlets, including the *New York Times*, *Los Angeles Times*, *Chicago Tribune*, and *Columbus Dispatch*, frequently seek his expertise, and he has appeared on Fox News, NBC News, The Today Show, and NPR. Prior to arriving at Moritz, he was a staff attorney with the ACLU Foundation of Southern California. Among the cases he has litigated are challenges to voting equipment and to election laws and procedures in California as well as Ohio.

**Edward B. Foley**, *Robert M. Duncan/Jones Day Designated Professor of Law at Moritz and Director of EL@M*, is one of the nation’s preeminent experts on election law. Professor Foley teaches and writes in all areas of this field, including substantial writings on campaign finance regulation. His current research focuses on improving the processes for resolving disputed elections, and he has recently begun leading a new American Law Institute project on election law. Along with Professor Huefner, he is at work on a book on the history of disputed elections in the United States, and has recently published several scholarly articles based on preliminary research for the book. These include “The Founders’ *Bush v. Gore*: The 1792 Election Dispute and Its Continuing Relevance” (*Indiana Law Review*), which he delivered at Ohio State in October 2008 as the University Distinguished Lecture; and a series of papers on Minnesota’s 2008 U.S. Senate election and its lessons for the future. Foley also designed a simulated dispute of the 2008 presidential election, which involved a special panel of three nationally prominent retired judges to adjudicate the hypothetical case. His essay “The *McCain v. Obama* Simulation: A Fair Tribunal for Disputed Presidential Elections” (*N.Y.U. Journal of Legislation & Public Policy*) explains how this experiment (including the opinion that the three-judge panel issued) can aid in resolving future disputed elections. Foley’s prior writings on *Bush v. Gore*, provisional ballots, and the Twelfth Amendment, among other related topics, set the foundation for these current and ongoing projects. His commentary on election law can be found at Free & Fair ([www.electionlaw.osu.edu/freefair](http://www.electionlaw.osu.edu/freefair)).



## About FROM REGISTRATION TO RECOUNTS

In the summer of 2006, the authors set out to study how five key Midwestern states had responded to the Help America Vote Act of 2002 and to the increased attention that matters of election administration had received in the wake of the 2000 presidential election. All of the five studied states – Illinois, Michigan, Minnesota, Ohio, and Wisconsin – had historically played pivotal roles in national politics, and in the early 21st century remained broadly representative of the U.S. as a whole. Furthermore, each state had a gubernatorial election looming in the fall of 2006, providing a rich opportunity to test the functioning of their recently revamped election ecosystems. The result of that study was FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES, published in 2007 to wide acclaim for its comprehensive analysis and objectivity.

As that original study made clear, however, election reform remained an uncompleted task more than one full presidential election cycle after *Bush v. Gore*. The 2007 book therefore included a number of state-by-state recommendations for further improvements, as well as overall judgments about the prerequisites of a sound election administration ecosystem. Thus, it was natural for the authors to return to the field during and after the 2008 presidential election to observe how election administration had continued to evolve in these five bellwether states in the two years since the original study. This sequel, FROM REGISTRATION TO RECOUNTS REVISITED: DEVELOPMENTS IN THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES, presents the results of that return to the field.

## About *Election Law @ Moritz*

*Election Law @ Moritz* is an award-winning program of nonpartisan research, education, and outreach concerning election law and administration. Formed in 2004, *EL@M* is a collaboration among the many faculty and staff of The Ohio State University Moritz College of Law with expertise in election law and related fields. Today *EL@M* is one of the country's premier centers of election law expertise, serving as a resource for lawyers, academics and educators, journalists, policymakers and other civic leaders, election administrators, and citizens interested in election law issues. Whether through its website at [www.electionlaw.osu.edu](http://www.electionlaw.osu.edu), faculty scholarship, conferences and programs, or media assistance, it is a resource for accurate and nonpartisan information and analysis. The principal faculty of *EL@M*, including its Director and Senior Fellows, are experts in the Help America Vote Act of 2002 and its implementation, including issues of voter identification and provisional voting; voting equipment design and technology; voting rights; and post-election recount and contest procedures. All of this expertise is brought to bear in the FROM REGISTRATION TO RECOUNTS project.

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